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DEPARTMENT OF LAW
UNIVERSITY OF DURHAM

**THE PROBLEMS OF TITLE TO MARITIME TERRITORY AND
RESOURCES WITH SPECIAL REFERENCE TO NIGERIA UNDER
INTERNATIONAL LAW**

BY

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A DOCTORAL THESIS SUBMITTED TO
UNIVERSITY OF DURHAM

IN FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE

DOCTOR OF PHILOSOPHY

LAW

APRIL, 2007

17 OCT 2007



ABSTRACT

This thesis examines the problems of title to maritime territory and its resources. It examines the problems in the context of international law and with special reference to Nigeria. It is significant in that it attempts to explore ways and means of amicably resolving the problems of title to the maritime territory and resources that would otherwise have inevitably resulted in possible disintegration of Nigeria as a nation, if nothing is done to checkmate it. Hitherto, political solutions had been applied to resolve the problems which are legal problems in nature; hence the problems have hardly received authoritative legal analysis. Thus the thesis relies heavily on primary sources in examining and analyzing the problems and in proffering possible solutions.

Considering the nature of the issues that are to be examined, significant contributions are made by the application of the principles of international law questions/issues to different areas of the law. These include examination of the legal nature of Nigeria's sovereignty over the territorial sea and its sovereign rights and jurisdiction in the exclusive economic zone in the context of the international law principles that have developed over the years and the constitutional and domestic law issues that the problems have generated. It also includes the problems of the international legal status of federating units of a federal State and the question of native title rights and self determination.

DECLARATION

No part of this thesis has been previously submitted for the award of a degree in the University of Durham or in any other University. This thesis is based solely upon the author's research.

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DEDICATION

This thesis is dedicated to my wife, Clara Modupeola Oni and to my children:

- (1) Emmanuel Oluwaseun Oni
- (2) Sandra Oluwabusola Oni
- (3) Sharon Tolulope Oni
- (4) Shadrack Oluwatobi Oni

ACKNOWLEDGMENT

First and foremost, the accomplishment of my ambition to undertake a PhD programme has been made possible by the special grace and mercy bestowed on me by the almighty God, my creator and the sustenance of my life. To God therefore, belong all praise, glory, honour and thankfulness.

As God often works through men, He has granted me special favour in the sight of the former Vice President, Federal Republic of Nigeria, Alhaji Atiku Abubakar, the former Deputy Chief of Staff to the Vice President, Prince Olusola Akanmode and the former Director General, National Boundary Commission, Alhaji Dahiru Bobbo. These men, whom I revere very greatly, have contributed in no small measure in making it possible for me to undertake this programme, I am eternally grateful to them.

I drew the inspiration and the encouragement to undertake this programme from my supervisor – Prof. Kayan Homi Kaikobad. He supervised my thesis with the best of his God-giving ability and dexterity. His very useful and guiding contributions, his patience and understanding have contributed in no small measure in enhancing the quality of my thesis. His interest in my progress and future career has been very encouraging, I am therefore eternally grateful to him.

My acknowledgment would be deficient and incomplete, if I failed to express an appreciation to Professor Colin Warbrick, Miss Holly Cullen (Reader in International Law), and Prof. Gordon Batho for their useful contributions in diverse ways. I am eternally very grateful to them.

To Helen Hewitson, Joanne Emerson, Rachel Tucker, Claire Prudhoe, and all other members of staff of the Law Department, Judy McKinnell and Anne Farrow of the Palace Green library, I say thank you all for assisting me in very many ways.

I wish to also use this medium to thank Dr. Albert Okoye, Dr. Francis Ndaji, Dr. Olasupo Olusi, Dr. Kaycey Ihemere and Mr Shumbahete for their helps in very diverse ways. I am eternally grateful unto them.

To my friends, Dr. Zeray Yihdego, Dr. Declan Amaraegbu, Hajia Hauwa Abdul, Dr. Jiangna, Dr. Carl Bjäruram, Yanbin Lu, Qingzi Zang, Ashley Savage, Micheal Kehinde and Mr Edet Essien, I say thank you all for your useful contributions and helps.

Pastor Dele Omotayo and Pastor Peter Adegbe have been particularly helpful spiritually. I cannot thank them enough for everything.

Last but most importantly, I am grateful to my wife- Clara Modupeola Oni for her contributions to the success of this thesis. I thank also my mother – Mrs Rodia Oni

and my elder sister – Mrs Florence Abiodun Mejedi, who both bore the financial burden of my training to become a lawyer.

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LIST OF ABBREVIATIONS

AC	Appeal Cases
AGF	Attorney General of the Federation
AJIL	American Journal of International Law
ALJR	Australian Law Journal and Reports
BYIL	British Yearbook of International Law
CA	Community Assistance
CAP	Chapter
CAT	Covenant against Torture and other Inhuman or Degrading Treatment or Punishment
CD	Community Development
CH	Chancery
CJN	Chief Justice of Nigeria
CLR	Commonwealth Law Reports
CNMI	Commonwealth of Northern Mariana Islands
CPD	Common Pleas Division
DLR	Dominion Law reports
DPR	Department of Petroleum Resources
ECOWAS	Economic Community of West Africa States
EEZ	Exclusive Economic Zone
EFCC	Economic and Financial Crimes Commission
EITI	Extractive Industry Transparent Initiative
ER	English Reports

ESI	Environmental Sensitivity Index
EWHC	English and Wales High Court
Ex. D	Exchequer Division
F. Supp.	Federal Supplement
FCU	Federating Coastal Units
FPSO	Floating Production, Storage and Offloading
GDP	Gross Domestic Product
H.L Cas.	House of Lords Cases
HMSO	Her Majesty's Stationary Office
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IFAD	International Fund for Agricultural Development
ILM	International Legal Materials
ILR	International Law Reports
ILO	International Labour Organisation
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
IVF	The Iduwini Volunteer Force
IYC	Ijaw Youths Council
JMRC	Joint Mineral Resources Committee

JSC	Justice of the Supreme Court
LFN	Laws of the Federation of Nigeria
LJPC	Law Journal Reports Privy Council New Series
LR AC	Law Report Appeal Cases
LSLN	Lagos State Legal Notice
MARPOL	International Covenant for the Prevention of Pollution from Ships
MASSOB	Movement for the Actualisation of a Sovereign State of Biafra
MEND	Movement for the Emancipation of the Niger Delta
MOSOP	Movement for the Survival of Ogoni People
MPR	Maritime Provinces Reports
NAMASA	National Maritime Administration and Safety Agency
NDDB	Niger Delta Development Board
NDDC	Niger Delta Development Commission
NDVF	Niger Delta Volunteer Force
NGOS	Non Governmental Organisations
NNPC	Nigeria National Petroleum Corporation
NSWLR	New South Wales Law Reports
NZLR	New Zealand Law Reports
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development

OMPADEC	Oil Mineral Producing Areas Development Commission
OPL	Oil Prospecting Licence
PCIJ	Permanent Court of International Justice
PSC	Production Sharing Contract
PSI	Proliferation Security Initiative
QBD	Queens Bench Division
R.I.A.A.	Reports of International Arbitral Awards
SAPREV	South African Petroleum Refinery
SAYIL	South African Yearbook of International Law
SCD	Sustainable Community Development
SCR	Supreme Court Reports
SDCEA	South Durban Community Environmental Alliance
SNEPCO	Shell Exploration and Production Company
SPPDC	Shell Petroleum Development Company
TLR	Times Law Reports
TS	Territorial sea
UAE	United Arab Emirates
UDHR	Universal Declaration on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNTS	United Nations Treaty Series

USA	United States of America
USAID	United States Agency for International Development
USSR	United Soviet Socialist Republic
WMD	Weapons of Mass Destruction
WSLN	Western State Legal Notice

NOTE ON THE FOOTNOTES

In the main text of the thesis, full citations of all references are given. In the case of monographs and reference books, the surname of the author is first cited, followed by the initials. The title of the monograph and reference book is cited in italics. This is followed by the volume or edition of the monograph or reference book, wherever applicable and the place and year of publication, which is usually in bracket. For example the book by R.R. Churchill and A.V. Lowe is referenced as, Churchill, R.R. and Lowe, A.V., *The Law of the Sea* 3rd edition, Manchester (1999), P.76

With regards to the unpublished theses and reports, the surname of each author is first cited, followed by the initials. This is followed by the title of the thesis or report, which is usually put in the quotation mark. The volume or edition of the thesis or report is cited with the place and year of publication in this order at the last.

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With regards to court decisions, including decisions by ICJ, PCIJ and other international arbitral tribunals, reference is first made to the name of the case, especially where this is not done in the main text, but where the name of the case is mentioned in the main text, I have proceeded in first quoting the year of the decision in brackets, the volume of the report where necessary, followed by the name of the court or tribunal and relevant page number and paragraph in case of some ICJ decisions. For example, the case, *Legality of the Threat or Use of Nuclear Weapons* is quoted as: (1996) ICJ Reports, p. 226 at paragraph 70. Where the dissenting opinion of a judge is quoted, the reference in my footnotes is usually by first naming the judge, where this is not done in the main text, but where the name of the judge is already mentioned in the main text, I have proceeded in the footnote by mentioning the name of the case, followed by the year the case was decided in brackets, the name of the court and the relevant page number. For example, the dissenting opinion of Lord Arnold McNair is quoted in the footnote as (1951), ICJ Reports p.116 at 160. His name is not mentioned in the footnote because it has already been mentioned in the main text. However, where the source of a case is the internet, I have usually referred to such cases in the footnote by first quoting the name of the case, where it is not already quoted in the main text, followed by the year of decision and the website where the case is found.

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Chapter One

I - Introduction

1. Scope of study

Problems of title to maritime territory and resources have existed from time immemorial. The problems initially started as a quest by a number of coastal States to expand their territorial hegemony over the adjacent maritime areas. Often, this was met by vehement opposition from other States favouring freer and more open seas. Thus, the maritime world in the periods between the 16th and the middle of 20th Centuries witnessed a clash between States favouring free and open seas and those States favouring closed seas. Thus various criteria were adopted by States in ensuring the annexation of at least a portion of the seas adjacent to their coasts.

Considerable success was recorded in this dimension as coastal States succeeded in annexing a portion of the seas adjacent to their coasts. With the annexation came the problem of the extent of the sea that could be closed and its juridical nature. Whilst the States succeeded in solving the problems of the nature of the TS through the Geneva Convention on Territorial Sea of 1958, the question of its breadth could not be resolved until the coming to force of the United Nations Convention on the Law of the Sea (hereafter referred to as UNCLOS), 1982, which provides for 12 mile Territorial Sea (hereinafter referred to as TS) limit for each coastal State. However, within the federal coastal States, such as Australia, Canada, the United States, Nigeria and others, the problems of the nature of TS cannot be said to have been so settled. Not only that, in Nigeria problems over maritime territory and its resources transcend mere dispute over the TS, the ownership and control of the entire maritime space and its resources are equally disputed. The thesis therefore seeks to investigate the problems as they affect Nigeria and the possible solutions that may be applied by Nigeria in permanently resolving the lingering dispute.

2. Historical development of Nigeria's coastal regions



To perfectly understand the nature of the problems as they affect Nigeria, there is the need to be aware of the historical development of the coastal region of Nigeria and the problems the development had created. Prior to colonization in Nigeria, there were Kingdoms and Empires that were located by the coast. The Kingdoms and Empires exercised as coastal frontage owners every right that any other coastal residents could exercise at that time. Nigeria became a colonial territory under Britain in 1861, through the conclusion of Treaties of cession and of protection with the local Chiefs and Rulers of the Kingdoms and Empires and subsequently through a series of diplomatic maneuvering, which later culminated in the Berlin West African conference of 1884-5, where Africa was partitioned among the competing European powers. Thus Kingdoms and Empires were constituted as colonies and protectorates soon after colonization. The colony of Lagos, the Southern and the Northern Protectorates were amalgamated to form the Nigerian State in 1914.

By the above method, the entire coastline and the adjacent maritime territory, which at that time stretched from a point on the border between Nigeria and Benin Republic to another point on the thalweg of the Rio del Rey (but now the thalweg of Akwayafe River in view of the recent judgment of the ICJ in the Land and Maritime Boundary case between Cameroon and Nigeria (*Cameroun vs. Nigeria: Equatorial Guinea intervening*)),¹ which divides both the Nigerian and the Cameroonian territories, with an approximate length of about 853 kilometres were brought under the control and dominion of the British Government. The coastal length can no longer represent the true coastal length of today's Nigeria; this is in view of the judgment in the above case which touches on both the land and maritime boundaries of Nigeria. The judgment has now awarded Bakassi Peninsula (though under very controversial circumstances) to Cameroun. Since Bakassi, which is also a local government area in Nigeria has now been formally handed over to Cameroun, the coastal length and the number of local government areas in Nigeria have been reduced very considerably. This requires the redrawing of the entire map of the country and an amendment to the Constitution to reflect the changes in the

¹ (2002), International Court of Justice Reports, p. 303

number of local government areas. This is in view of the rejection of the thalweg of Rio Del Rey River as the boundary in favour of the thalweg of Akwayafe River and the consequent transfer of about 33 towns and villages by Nigeria to Cameroun, Nigeria receiving only two villages in return. It is located on the western coast of Africa and is washed by the waters of the Gulf of Guinea on the Atlantic Ocean.

Nigeria emerged as an independent sovereign nation on the 1st of October, 1960, following an application for membership² made to the United Nations Organization and following a resolution formally admitting it into membership of the international community on the 7th of October 1960.³

Prior to Nigeria's independence on 1st October, 1960, Nigeria right from the time of the amalgamation in 1914 up to 1951, was governed by the British as a unitary State. Therefore, no problems of title to the maritime territory and its resources arose at that time to the scale that Nigeria is currently experiencing. The problems started in 1951, when a federal Constitution was enacted, which divided the entire country into three Regional Governments namely, the Western, Eastern and Northern Regions with the Colony of Lagos constituted as the Federal territory.⁴ Thereafter, the Regions were further subdivided into four Regions by the creation of the Midwestern Region out of the old Western Region.⁵ Thus the Western, Mid-western and Eastern Regions, including the Colony of Lagos were the Regions and Colony that initially bordered the Atlantic Ocean until the military takeover of the reins of Nigerian Government in 1966. Following this forceful takeover, a further state creation exercise was undertaken, which led to the regions been subdivided

² Official Records of the General Assembly, Fifteenth Session, Annexes, agenda item 20, document A/4527 in <http://www.un.org/documents/ga/res/15/ares15.htm>.

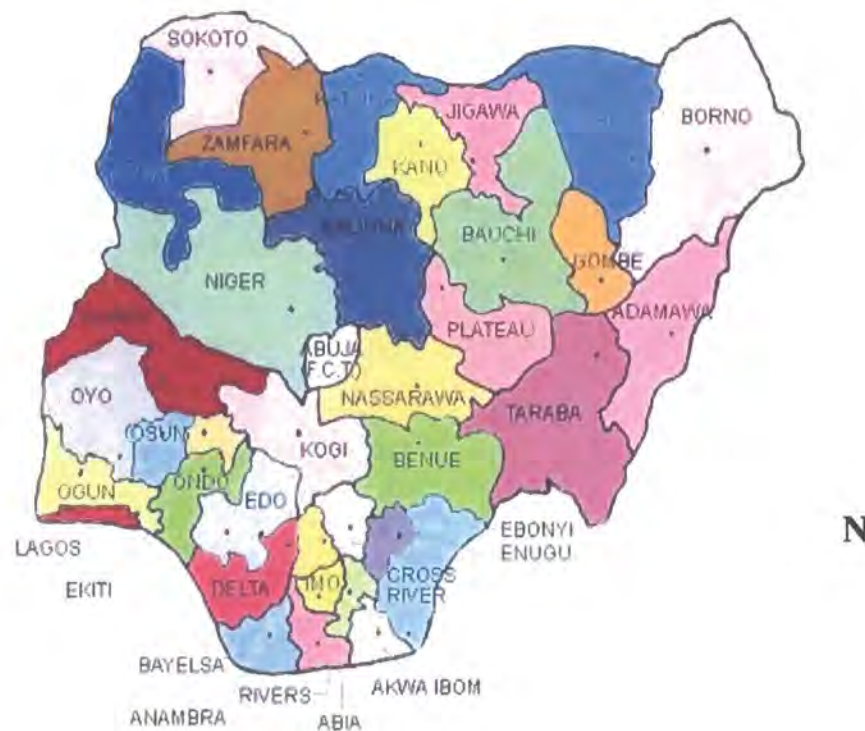
³ UN General Assembly Resolution 1492 (XV) of October, 1960

⁴ Section 3 of the Constitution of Nigeria, 1963 (amended in 1967).

⁵ Mid-Western Region (Transitional Provisions) Act, 1963; Constitution of Mid-Western Nigeria, 1964

into twelve states.⁶ Nigeria as shown in the map below now consists of 36 states,⁷ one Federal Capital Territory and 768 Local Government Areas.⁸

Figure one: Map of Nigeria showing the current states



Source⁹

As can be seen in the above map, Akwa-Ibom, Bayelsa, Cross River, Delta, Rivers, Ondo, Ogun and Lagos states are presently the federating units that are bordering the sea. The eight states will hereafter be collectively referred to as the Federating Coastal Units (FCU). The problems of title to the resources and maritime territory

⁶ States (Creation and Transitional Provisions) Decree, 1967 and States (Creation and Transitional Provisions) (Amendment) Decree, 1967

⁷ Nigerian Constitution, 1999, section 3 (1)

⁸ Ibid, sub section (6). The number of the Local Government Areas has now reduced in view of the implementation of the ICJ judgment, which ordered the transfer of Bakassi Peninsula which had hitherto been a Local Government Area in Nigeria to Cameroon.

⁹ <http://www.fao.org/ag/AGP/agpc/doc/counprof/nigeria/nigeria.htm>

of Nigeria started in earnest with the enactment of the Constitutions creating the above mentioned Regions.

Furthermore, in 1956, the first discovery of petroleum in very large volume was made at Oloibiri in the present day Bayelsa state.¹⁰ Thereafter, other large deposits of oil and gas have been found in onshore and offshore areas of the entire length of the coast of Nigeria. Nigeria therefore is presently the world's fifth largest oil producer and exporter. The revenue derived from the sale of oil and gas exploration and exploitation activities accounts for well over 80% of the total annual revenue accruable to the Nigerian Government. The revenue is shared between the Federal Government and all the federating units in Nigeria. Initially, all the federating units located along the coast, whether or not oil has been found in the adjacent sea areas of the units, receive more percentage from the revenue than any other federating units. Presently however, only the federating units regarded as oil and gas producers receive more in percentage than every other federating unit. By virtue of section 162 (2) of the 1999 Constitution, the oil producing FCU, which include Akwa-Ibom, Bayelsa, Cross River, Delta, lately Edo, Imo, Ondo and Rivers are presently paid thirteen percent more than other federating units from revenue realised from oil and gas. Abia and Imo are oil producing federating units but they are not located by the sea, as such are not members of the FCU.

It must be emphasised, that it is not all the FCU that are currently and seriously jostling to wrest ownership of maritime territory and its resources from the Federal Government. Those in the forefront of the campaign are the Niger Delta members of the FCU. The Niger Delta itself is made up of federating units such as, Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers and covers an area of about 70, 000 square kilometres with about 560 kilometres coastal length. This coastal length is argued to represent about two-thirds of the total coastal length of Nigeria. Niger Delta is blessed with an estimated population of about 26 million people spread among the constituent federating units noted above. Thus out of all the federating units that make up the Niger Delta, only Akwa-Ibom, Bayelsa, Cross

¹⁰ Nigerian Vanguard Newspaper of 8th May 2004 – <http://www.vanguardngr.com>.

River, Delta and Rivers states can be currently said to be in the forefront of the campaign to wrest control and ownership of the sea and its resources from the Federal Government. Furthermore, out of all the federating units that make up the Niger Delta, only Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers can be conclusively said to be oil and gas producing federating units in Nigeria. In Lagos and Ogun states, oil has been found in exploitable quantity but only the deposits in Lagos are now being worked on.

With the enormous revenue accruing to Nigeria from oil and gas activities, it is normally expected that a proportion of it should be devoted to be positively impacted upon the people and develop their environment as is seen in other oil and gas producing States around the world. However, reverse is the case. Evidence abounds, for example, to show that the Niger Delta remains underdeveloped in terms of physical, social and economic development. It is an area, which has been ravaged by severe environmental degradation caused by pollution arising from oil and gas exploration and exploitation. The above coupled with the incessant gas flaring have combined to destroy the ecosystem and the biodiversity of the area, the traditional means of livelihoods, which are predominantly farming and fishing and have resulted in untold poverty, disease and deprivation. The oil and gas companies operating within the areas do not help the matter any better, they have persistently refused or ignored the need to apply the type of international measures and standards being applied elsewhere to the Niger Delta, either to reduce the incidence of pollution or to help in the development of infrastructure and alleviation of poverty of the people.

The Niger Delta people who have been forced to live with the problems for well over forty years since independence in 1960 have now become frustrated and in their words "have decided to take their destinies in their own hands." This they are doing resulting to violence and unprecedented restiveness. Presently, the Nigerian maritime areas, especially the Niger Delta areas, are now characterised by unwarranted violence, and the violence is threatening the very existence of Nigeria as a corporate and united entity. This has led to the rule of law being replaced by

the rule of anarchy over the land territory and the immediate sea areas adjacent to Nigeria. The mode of the violence, which in most cases involve incessant blowing ups of oil and gas pipelines, ambushes, arsons and kidnappings/hostage takings, killing and maiming of oil and gas workers, policemen and soldiers posted to the region to secure life, property and investment all raise the question of terrorism.

Thus, the problems of title to the resources and maritime territory have now assumed the dimension of an agitation to wrest total ownership and control of resources and the maritime territory adjacent to Nigeria from the Federal Government. The agitation as will be shown in chapter four and five is generally hinged on the concept of native right/natural prolongation, rights of self determination and institutionalisation of true federalism in Nigeria.

3. Analysis of the title problems/research questions

Maritime title problems as they currently exist in Federal coastal States, such as Australia, Canada, the United States of America and Nigeria can be linked to a number of different but very controversial factors. First and foremost, the problems may be argued to have been triggered by the importance of the seas and oceans to most States as channels of commerce, transportation and national security. This informs the desire of every government of a coastal State to control its maritime space. The problem could also be linked to availability of natural resources of fisheries, hydrocarbon, gas, manganese nodules and other natural resources of the adjacent sea areas. The Federal Government wants to exercise power of ownership and control, at the same time the FCU too want to exercise power of ownership and control over the same maritime space and its resources. The question therefore, is which between the two tiers of government has the legal right to own and control the maritime space and its resources?

The above problems arose as will be elaborated on in subsequent chapters from the facts of history, whereby before the formation of the union some states (US and Australia) and provinces (Canada) were either independent sovereign states (e.g.

Texas in the US) or were colonies or protectorates before joining the union. In Nigeria the entities that today make up the Nigerian State were initially independent Kingdoms, Empires and Emirates, but during colonialism, some of them were either colonies or protectorates. The question again, is whether the states as in the US and Australia, provinces as in Canada and colonies and protectorates as in Nigeria entered the federal unions at independence with their former rights over the adjacent TS? The States that were already sovereign, including those that were Kingdoms and Empires before the formation of the federal union, believed they came into the unions with their formal rights over the adjacent sea and as such should control its resources. The Federal Government however thinks differently. These problems were not adequately addressed by the Geneva Convention and UNCLOS.

With the introduction of colonialism came also the problems of whether or not the transfer of rights to the colonialists could be termed state succession in international law, so that the colonialists assumed all the rights previously exercised by the Kingdoms and Empires. This question repeats itself at independence of the States. Furthermore, the Kingdoms and Empires in Nigeria that were formerly protectorates believed that the treaty of protection signed by them with the British did not affect their rights in the submarine areas and as such their powers of dominium and imperium hitherto exercised over the adjacent sea areas were unaffected and were not diminished in any way by the fact of treaties.

The climax of the maritime title problems was reached in Nigeria in 2001, when the Supreme Court was invited by the then Attorney General of the Federation in the case of *Attorney General of the Federation vs. Attorney General of Abia state and others (NO. 2)* (hereafter referred to as *Abia case*), to determine *inter alia* the southern or seaward boundary of each of the eight federating coastal units of Akwa-Ibom, Bayelsa, Cross River, Delta, Lagos, Ogun, Ondo and Rivers within the Federal Republic of Nigeria. The court had the opportunity of resolving once and for all the maritime title problems in Nigeria, but the opportunity was wasted by its

determination that, “the seaward limit of Nigeria is the low-water mark but Nigeria in exercise of its sovereignty and by the custom of the international community exercises jurisdiction beyond that limit.”¹¹ The determination by polarizing the maritime space of Nigeria to onshore and offshore for the purposes of entitlement to oil and gas revenue sharing by the FCU, further increased the tempo of agitation over ownership and control of the maritime territory and resources to a more dangerous dimension than ever before. It has thus raised further problems, of both international and domestic laws dimensions.

3.1 International law problems emanating from *Abia case*,

The following international law problems could be elicited from the decision of the Supreme Court of Nigeria in *Abia case*:

- (a) Problem of whether or not the TS is included within Nigeria’s national territory so that it exercises sovereignty over it.
- (b) Problem emanating from the concept of natural prolongation. Whether natural prolongation as used by the Geneva Convention on Continental Shelf and subsequently by UNCLOS to define Continental Shelf is a reference to the Continental Shelf of a State as an entity or only to the Continental Shelf of the federating units of a federal State, which are adjacent to the sea.
- (c) problem of determination of contiguity between Nigeria and its FCU
- (d) Problem of native title rights. Whether they are exclusive to the holders or not, and
- (e) Problem of which between the federation and the FCU possesses international legal personality to assume ownership and control of maritime territory and its resources

3.2 Problems emanating from Nigeria’s domestic laws

¹¹ (2002)6, Nigerian Weekly Law Reports, pp. 588 - 598

The claims of the FCU are also strengthened by the major lacunae in some of the domestic laws of Nigeria on the various maritime zones. The failures of the domestic laws are most pronounced with regards to the TS, where until now, Nigeria's rights and interests are a matter for speculation. This is so because, Section 1 (1) of the Territorial Waters Act provides that: The territorial waters of Nigeria shall for all purposes include every part of the open seas within thirty nautical miles of the coast of Nigeria (measured from low-water mark) or of the seaward limits of inland waters. The thirty miles have now been amended to 12 nautical miles by the Territorial Waters Amendment Decree. As can be seen, the Territorial Waters Act does not specifically claim the sovereignty granted Nigeria over the TS by international law. It can be said without mincing of words that presently, there is no Nigerian domestic legislation, which specifically claims sovereignty granted the country by international law over the TS, the airspace above it and the sea-bed and the subsoil of the submarine areas.

Thus, apart from the provisions of the Geneva Convention and the UNCLOS, which reserve sovereignty over the TS, the airspace above it and the sea-bed and subsoil for coastal States in general, the only right which it may be argued Nigeria has specifically claimed by its domestic laws in the TS is that of limited jurisdiction. The limited jurisdiction does not extend to foreigners by virtue of the Supreme Court pronouncements in *Abia case* and does not also extend to the airspace, the sea-bed and subsoil of the TS. As will be shown in chapter two, even the rights granted by UNCLOS are still disputed in Nigeria, because UNCLOS uses the word "state" and the federating units in Nigeria are equally referred to as states.

The Territorial Waters Act is not the only Act in this category. For example, section 1(1) of Petroleum Act and section 1 (1) of the Minerals and Mining Decree both vests ownership and control of all petroleum in, under or upon any land on the State. Both laws claim the property in the TS and other areas of the maritime space, but not the sovereignty granted by international law over the TS itself or the

sovereign right over the CS. As will be expatiated in subsequent chapters, this is a grave omission which Nigeria must address.

Even the Constitution of the country, which is the *grundnorm* of all other Nigerian domestic laws, does not contain provisions which are specific enough as to declare Nigeria's sovereignty over the territorial sea (hereinafter referred to as TS) or its sovereign rights and jurisdiction over the Continental Shelf (hereinafter referred to as CS) as granted by international law. Take for instance, section 44 (3) of the Nigeria's 1999 Constitution, which is the only provision in that Constitution on the ownership of maritime territory and resources provides: Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly. This provision like the Petroleum Act and the Minerals and Mining Decree mentioned above merely claim the petroleum, gas and other mineral resources in Nigeria's maritime space but not the actual rights granted Nigeria by international law over the TS the CS. This is unlike the Exclusive Economic Zone Act, which specifically declares Nigeria's sovereign right over the Exclusive Economic Zone (hereafter referred to as the EEZ).

Furthermore, Nigeria has not enacted any legislation to claim its rights over the CS, as defined by Article 76(1) of the United Nations Convention on the Law of the Sea (hereafter referred to as UNCLOS) 1982. That Article defines the CS as: "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin..."¹² Upon it, Article 77(1) grants a coastal State sovereign rights for the purpose of exploring and exploiting its natural resources.

¹² UNCLOS 1982

It is understood quite clearly that under international law, a coastal State need not claim CS rights before it can exercise them, but in a federal state with problems of title over the maritime territory and its resources, there is the need for a domestic law, which clearly proclaims the sovereign rights and jurisdiction of the state over the adjacent CS. The failure of Nigeria's domestic laws to claim the specific rights granted by international law or the failure to claim the rights at all has caused further problems between those laws and International law. For instance, Nigeria is a dualist State, which means international law is looked at as being separate and independent from the domestic laws of Nigeria. The problem is which between the two legal systems is superior to the other. This problem as will be further reflected in subsequent chapters is compounded by international decisions, which preclude States from pleading domestic laws as reasons for failure to perform international obligations undertaken by them under specific treaties.

Also, the maritime practice of Nigeria as exemplified by its legislative, judicial and executive practices indicates a remarkable lack of understanding of the basic tenets and principles of the law of the sea. Some of these principles, because of their uniqueness and novelty are not unambiguously dealt with by UNCLOS and thus can only be determined by examination of the practice of States.

Another domestic law, which has created problems of title for the maritime space of Nigeria, is the Dichotomy Act. This Act was enacted in 2004 to cushion the effects and hardship caused by the decision in *Abia case*, but as will be shown in chapter six, it too suffers from numerous problems. Most especially, the Act, because it has the effect of changing the provision of Nigeria's Constitution on revenue sharing and the areas covered by the revenue sharing formula, it can only be legally enacted pursuant to the provisions of Section 9 (1) & (2) of the 1999 Nigerian Constitution. That section spells out the procedure that must be followed in enacting laws that have the effect of changing the provision of the Constitution, by requiring in sub section (2) the votes of not less than two-thirds majority of all the members of the National Assembly and approved by resolution of the Houses

of Assembly of not less than two-thirds of all states. This procedure was never complied with before that Act was enacted. The questions are these:

- (a) Has the Dichotomy Act resolved the title problems over Nigeria's maritime space and resources?
- (b) What are the implications and other shortcomings of that Act?
- (c) What other methods have been adopted by the Federal Government to resolve the dispute?

As a corollary to the above, the decision in *Abia case* has also led to increase in the tempo of agitation for the assertion of rights of self determination by the Niger Delta people and the demands for the implementation by the Nigerian Government of true federalism in Nigeria. True federalism has also raised the question of whether sovereignty in these States resides with the federation, so that it alone claims the international rights granted by the Geneva Convention and subsequently UNCLOS or whether it resides with the federating units. The argument has also been canvassed that sovereignty in these States are concurrent so that both the federation and the units are sovereign in their own rights and as such each unit has declared entitlement to the rights over the maritime territory adjacent to it. An extreme case of the problem is seen in Nigeria, whereby the FCU claim equal sovereignty with the federation and the right to control the resources of the maritime territory to the exclusion of the federation. Thus, this thesis seeks to address all the above problems.

In carrying on the research, the method adopted is primarily library research, including Public Records Office research conducted both in Nigeria and in the United Kingdom. It also includes the several personal interviews conducted with some high ranking Nigerian officials, such as the then Attorney General of the Federation of Nigeria, Legal Officers and youths from the FCU.

On the basis of the above therefore, the thesis is divided in the main into seven chapters. The first chapter is this introduction, it analysis the nature of the problems

the thesis is confronted with and how it will go about them. The second chapter begins by an attempt to trace the origin of maritime claims by coastal States. This is followed by an examination of the question of three mile TS dimension, whether the concept was universally adopted and if not, whether Britain the then colonial master of Nigeria adopted it and if it adopted it, whether it subsequently introduced the practice to Nigeria or not, taking into account the role of colonisation in the creation and development of norms of law of the sea. This chapter also attempts the determination of the true juridical character of the TS of Nigeria that is, whether the authority of Nigeria over it is that of imperium or dominium. That is whether the TS forms part of the national territory of Nigeria or not and the nature of governmental powers over it. The domestic laws and practices of Nigeria are examined in order to determine their conformity or otherwise with international law on the question of the nature of the TS.

In doing all the above, attention will necessarily focus on examining the various theories, such as the Hegel, Kelsen and the property theories on the nature of TS and the relevant customary international laws (state practice and opinion juris) on the matter. It will examine what the nature of Nigeria's TS was during the pre-colonial and colonial eras and what it has been thereafter. The aim is to determine through empirical evidence the basis of the claims to ownership of the sea and its resources by the Federal Government and the FCU, whether such claims can be grounded and sustained under international law and the domestic laws of Nigeria. It is intended to sever the TS for separate discussion from other maritime zones and to determine whether or not the FCU by their having been resident along the coast from time immemorial before the formation of the Nigerian State may have a basis for disputing the Federation's title over the TS. It also demonstrates that whilst the FCU by their having been resident by the coast from time immemorial may have a basis to dispute the Federation's title over the TS, the same cannot be the case with regards to the CS and the EEZ beyond the TS, which did not exist at that time.

Chapter three then deals with the juridical nature of the EEZ. It attempts to investigate the true juridical character of the EEZ that is, whether the EEZ is a part

of the TS, the high seas or whether it possesses a separate legal regime of its own. The chapter begins by the examination of the legal evolution of the CS, which is inextricably linked to the EEZ and thus warranted their treatment together. It will examine the various postulations that were put forward by some States before the concept of EEZ was finally adopted and incorporated in international law. In this connection, a thorough investigation will be conducted to determine the unique characteristics of the EEZ, which differentiate it from other maritime zones. The aim is to demonstrate through empirical evidence that because the EEZ is different from both the TS and the High Seas, the authority and rights of a coastal State are similarly different from those it possesses over other maritime zones. By the same token, the chapter aims to investigate the reasons why the FCU cannot lay any valid claim on the EEZ and CS beyond the TS even though they have occupied the coastal areas before the formation of the Nigerian State.

Further to the above, chapter four deals with the climax of the title dispute between the Federal Government and the FCU over the control and ownership of the sea areas adjacent to Nigeria and its resources of hydrocarbon, gas, fishery and other oceanic resources. It attempts to determine, which between the two tiers of the Nigerian government owns or should own and control the maritime territory and its resources. In doing this the *Abia case*, which the Federal Government instituted in order to legally resolve the controversy, will be subjected to very critical scrutiny. This is with a view to properly examining the decision, its *ratio decidendi* and the legal implications of the various errors, misconceptions and misapplication of certain concepts by the Court. This is done in order to determine the justice of the case and whether it has finally resolved the controversy or not.

Chapter five on the other hand focuses on the Allocation of Revenue (Abolition of Dichotomy in the Application of Derivation) Act. It analysis the reasons offered by the President in seriously curtailing the scope of the Act. The chapter attempts to determine the strength and shortcomings of that Act and its capability or otherwise in ameliorating the harshness caused by the judgment in the *Abia case*, which it was originally intended to mitigate. Attempts will be made to answer the question

whether the enactment of the Dichotomy Act and other initiatives of the Federal Government had put an end to the title dispute between the parties?

The concepts of true federalism and self determination which, *inter alia* form part of the real reasons or arguments why the Niger Delta people want to wrest ownership and control of the maritime territory and its resources from the Federal Government will be critically examined. This is with a view to determining whether the concepts can legally be relied upon to wrest control of the maritime territory and its resources from the Federal Government.

To be able to proffer acceptable, enduring and proven solutions to the problems of maritime title in Nigeria, chapter six undertakes an in-depth comparative study of similar title problems in other Federal States and how the affected States succeeded in resolving the disputes. In this context, the practical methods adopted by the United States, Australia and Canada in either finally resolving the problems or at least abating it will be investigated. This is done with the aim of finding practical lessons for the resolution of similar problems by Nigeria.

Finally, chapter seven is conclusions and recommendations. It gives a brief summary of the thesis by bringing out the main themes and salient legal points raised and discussed in the thesis. It also points out the main findings of the study and recommendations for permanent resolution of the controversy.

Chapter two

The Nature of the Territorial Sea as perceived by Nigeria: The Problems of Law and Theory

I. Introduction

Determination of the question of the nature of the TS of Nigeria has more than ever before become of the utmost importance to the Nigerian Government as it is to most maritime nations the world over. The question of the nature of TS is vexed and has been discussed by many academic writers and jurists. The discussions centre mainly on whether the authority of a coastal state over the TS is imperium, dominium or sovereignty.¹ That is, whether the TS formed part of the national territory of the adjoining State or not. In the extreme case, the theories of imperium, dominium and sovereignty have been outrightly rejected in favour of TS being a 'bundle of servitudes.' Until the coming to force of the Geneva Convention on Territorial Sea, 1958 and lately, the 1982 UNCLOS, international law, including judicial decisions and State practice had remained uncertain on this question. Notwithstanding the clarification of the juridical nature of the TS made by the Geneva Convention on Territorial Sea and specifically by UNCLOS, the precise nature of the TS is still disputed in most federal States.

It is important to resolve the issue of the nature of the Nigerian TS, because such a resolution would help to correct the erroneous impression about whether or not the territorial boundary of Nigeria ends at low-water mark. The precise juridical basis of Nigeria's governmental authority depends to a very large extent on the correct determination of the nature of the TS adjacent to its coastline. The question whether Nigeria's right over the TS is that of dominium, in the sense that she possesses property rights or it is that of imperium in the sense of jurisdiction or sovereign rights has to a large extent come to depend upon proper determination of the juridical nature of the TS. Whether Nigeria considers itself as possessing

¹ Generally, see O'Connell, D.P., *The International Law of the Sea*, vol. 1, Clarendon, Oxford (1982), p.1 – 24; 60 – 82; Fulton, T.W., *The Sovereignty of the Sea*, Edinburgh (1911) reprinted by New York state library (1976), pp. 1 - 25

sovereignty over it thereby treating the same as forming part of the national territory depends too on the proper determination of the nature of the TS.

The importance of proper determination of the nature of the TS and the juridical basis of the Nigerian governmental powers and authority can be better appreciated in the light of the distribution of rights between Nigeria – a federal State and the federating units, especially the FCU. Proper determination of the question would *ipso facto* and *ipso jure* help in the determination of the question of who has title or should control the maritime territory adjacent to Nigeria and its resources between the two tiers of government. Thus, a correct determination of the legal status of this zone would help Nigeria determine her rights over the zone in relation with the rights of other coastal States.

Closely related to the problems of nature of the TS is the controversy, which initially surrounded its dimension. Several criteria, such as limit of visibility, mid-channel, range of navigation, thalweg, cannon shot rule and the three mile TS concept were initially adopted to describe TS dimension of a State. The practice of States on TS dimension is as conflicting as its nature. For instance, there were the proponents of three-mile TS and there were those that argued for different distances. With respect to Nigeria, it is important to clarify the actual dimension of the TS that the majority of States were prepared to concede in the 18th and 19th Centuries. Doing so would no doubt help in determining the farthest extent of the sea areas that the former Kingdoms and Empires that today make up the coastal areas of Nigeria were arguably able to control before colonization and after. Determination of the dimension of the TS during the above period would help in determining the dimension of sea boundary that the various Kingdoms and Empires could argue they brought into the union of Nigeria both in 1914 that the Kingdoms and Empires were amalgamated to form the State of Nigeria and after decolonization in 1960. This part of the thesis argues that the TS, both at the time the distance was held to be three miles and the current twelve miles forms part of the national territory of Nigeria.

II. The Problems as Perceived by Nigeria

Article 1 (1) & (2) and 2 of the Geneva Convention on Territorial Sea and Contiguous Zone of 1958, and Article 2 (1) & (2) of UNCLOS, clearly and unambiguously affirm the sovereignty of the coastal State over the TS, the airspace above it, the sea bed and the subsoil thereof. With respect to the breadth of the TS, Article 3 of UNCLOS provides that: Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention. In doing so, international law may be held to have resolved the problems of the dimension and of the dominium, imperium and sovereignty issues over the TS. It is therefore expected that the controversy surrounding the nature and dimension of the TS would have suffered a natural demise or at least have abated. However, the issue of the ownership of the maritime territory between the Federal Government and the FCU has again brought to the fore the issue of the juridical nature of the TS. It has also brought to the fore the issue of the dimension of the TS, because it will be practically impossible to determine the issue of the nature of Nigeria's TS without knowing the dimension of the sea upon which the acts of dominium and imperium were exercised, either before colonization and especially before the coming into force of UNCLOS in 1982. The problem has thus become a national question for Nigeria and problem to be resolved by Nigerian laws as interpreted and applied by Nigeria's courts. The ghost of the nature of TS therefore continues to haunt most Federal States. The problems as they affect Nigeria may be categorized as:

(I) Judicial pronouncements,

(II) Absence of domestic law, which declares Nigeria's interests in the TS,

(III) General ignorance and exploitation of the masses,

(IV) Inconsistent maritime policy formulation,

(V) Politicization of maritime issues, and

(VI) Uncertainty of breadth of the TS under 1958 Geneva Convention on TS.

1. Problems arising from judicial pronouncement

In what appears to be a resurgence of the nature of the TS, the Supreme Court of Nigeria in *Abia case* has declared that the southern boundary of Nigeria ends at low-water mark and that beyond that point Nigeria only has power to exercise sovereign rights over the territorial waters and airspace and that they do not constitute an extension of the territorial boundaries of Nigeria or indeed that of the FCU.²

A strict interpretation of the decision would raise the following implications:

- (a) That Nigeria does not possess sovereignty over its TS, notwithstanding the provisions of UNCLOS, which grants the power of sovereignty to it. The statement of the court equates the power of Nigeria over the TS to that of sovereign rights or mere jurisdictional rights, which do not even extend to offences committed by foreigners within the TS of Nigeria;
- (b) That Nigeria does not also possess sovereignty over the airspace above the TS;
- (c) That Nigeria does not possess sovereignty over the seabed, subsoil of the TS and the resources that lay underneath it, and
- (d) Above all, that the TS does not form part of Nigeria's national territory.

Not only that, the judgment interpreted the word 'sea' to mean low-water mark, thereby equating the sea with low-water mark which is nothing but a dry land covered by water only at high tide. Thus by that judgment, the Supreme Court of Nigeria has again brought to the fore, the issue of the nature of the TS thought to have been long resolved.

2. Absence of domestic laws which declare Nigeria's interests in the TS

The second problem is the absence to date of domestic laws, which specifically and

² (2002) 6, NWLR, part 764, p. 660

unambiguously declare Nigeria's interests and rights in its TS and in other maritime zones adjacent to the country. This problem is a carry over from the practice during the colonial era, especially soon after the discovery of petroleum in the maritime territory of Nigeria. From that time onward, the country's interests focused more on the resources than the ocean itself, the subsoil and the airspace thereof. Therefore, most of the domestic laws relating to the maritime territory have concentrated on claiming the resources and not the seas themselves.

3. General ignorance and exploitation of the masses by the elites

The third problem is the general lack of informed knowledge about the basic principles of the law of the sea as they affect the TS and other maritime zones of Nigeria. This has led to misuse and misapplication of certain basic principles and concepts of the law of the sea, with the result that the minds of the ordinary coastal people have now become habituated to or inculcated with such ideas that the sea adjacent to Nigeria belongs solely to them and that it is their God-given gift, which they must control. This has in turn led to the formation of groups by the Niger Delta people that are currently championing the course of resources control. Thus in a statement preparatory to a proposed mass rally, the spokesman of the Ijaw Youth Council (IYC), Mr Peter Ajube stated:

- The proposed mass rally by the Ijaw Youth Council (IYC) Worldwide is to further demonstrate to the entire world the impeccable desire of Ijaw people and the other Niger Delta ethnic nationalities to own and control their God-given natural resources for the rapid socio-economic and infrastructural development as well as environmental protection...³

As a consequence therefore, exploration, exploitation, navigation and other marine activities are now being hampered by the activities of these groups, which in most cases are violent. This has negative consequences on investment in the downstream oil and gas sectors of the Nigerian economy. It is equally antithetical to the real intention of UNCLOS 1982, which *inter alia* includes the promotion of the rule of

³ Vanguard Nigeria Newspaper of 8th August, 2005 in http://www.vanguardngr.com/articles/2002/niger_delta/nd20802005.html

law and peaceful uses of the world's seas and oceans and their resources by all nations of the world.⁴ It is the same lack of informed knowledge about the nature of the TS that has led the Supreme Court in *Abia case*, to describe *inter alia* the power and authority of Nigeria in relation to its TS, the subsoil below and the airspace above it as something akin to sovereign rights or rights of jurisdiction and to adjudge that the territory of Nigeria ends at low-water mark.⁵

Commenting on the issue of unrest and violence in the Niger Delta areas and the negative consequences it has generated, Mr. Olumide Onakoya, the Managing Director of Mobil Oil Nigeria, observes as follows:

"It is not that we are not interested in investing in our refineries. In fact, these refineries are a great national asset. But the way things are going today, if we put money in these refineries, we will not get return on our investment.... Government must do something to ensure that it address the problem of unrest and hostility between oil communities and oil companies."⁶

4. Inconsistent maritime policy formulation

The fourth problem created by the uncertainty of the nature of the TS has to do with formulation of marine policies by the Federal Government. Because the nature of rights Nigeria possesses over the TS is not clear or well understood even by the government, formulation of maritime policies has been inconsistent, conflicting and fluctuating. This explains why the Federal Government has consistently repeated the mistakes, such as including in its enactments a clause which makes the CS of Nigeria to be part of the state it is most contiguous to, even when it is clear that the inclusion of a similar clause in the independence and republican Constitutions had led in the past to misinterpretation by the people of the Niger Delta. The public statements of the leaders too do not help the matter. Indeed, the President and some Governors in their public statements still refer to the sea and its resources as

⁴ See paragraph 4 of the preamble to UNCLOS, 1982

⁵ Op. cit., note 2, p. 731

⁶ Vanguard Newspaper of 4th June, 2005 in <http://www.vanguardngr.com/articles/2002/business/june05/03062005>

belonging to the FCU.

5. Politicisation of maritime issues

The fifth problem is the politicisation of maritime issues by the successive governments in Nigeria. This has led to constant review and adjustment of maritime policies and in the revenue paid to the FCU and in the areas of the sea covered by such revenues. For example, in their bid to win elections, politicians have made promises of either increasing the percentages payable to the FCU from revenue accruing from oceanic resources or that when voted to power they would look into the agitation of the FCU for resources control with a view to finding amicable cum political solutions to the problem. Politicians have also promised to develop the infrastructure, improve educational and health facilities. The promises were made by politicians who have little or no knowledge of the principles of law of the sea involved and in the implication of such promises. This therefore begs the question: Whether the problem of politicization addressed in this subsection could be resolved by recourse to international law or it is purely a national or domestic constitutional law issue? This attitude has generally imbued the minds of the citizens of the FCU with the impression that the generality of Nigerians acknowledge their ownership of the maritime territory adjacent to Nigeria, therefore, once in power, the FCU expect the fulfillment of the promises made by the politicians and where no fulfillment is forthcoming there is a general recourse to violence. Nigeria has consistently applied political solutions to a legal problem.

6. Uncertainty of breadth of TS under the 1958 Geneva Convention on TS

The sixth problem is that, the Geneva Convention of 1958 failed to specify the dimension or breadth of the TS, whether at three miles or at any other distance at all. This was because at the time of the Geneva Convention, States could not agree or find a compromise on the breadth of TS. Thus the three mile TS States held fast to their three miles TS, while those that claimed other distances, for example the Scandinavian States held fast to such distances. There were also the Latin American States who argued for a much wider TS dimension. This argument was also carried

as far as to whether the three miles, which so many maritime States claimed at that time formed part of the national territory of the adjoining State or not.

The controversy arose as a result of the use of the word 'sovereignty' to describe the right a nation possesses over her TS, which word is so ambiguous that different meanings have at different times been read into it. This controversy was particularly more pronounced among federal States, which in most cases have the question of distribution of rights to determine between them and their federating units. In recent time, however, this problem has known no bounds nor is it peculiar only to the federal States. For example, the unfolding events in Scotland⁷ over the question of ownership of the oil deposits in the North Sea between Scotland and the rest of the United Kingdom now suggest that some unitary States too are not completely immune or exempted from the problem of determination of the nature of TS.

Concluding on the views above, it is right to argue that UNCLOS has addressed the question of the nature and the dimension of the TS and that the *Abia case*, which brought the issues up again misunderstood international law on those points. However, UNCLOS addresses States generally without taking into consideration the problem of sovereignty in federal States. Similarly, *Abia case* is still a valid judgment in Nigeria and to resolve the problems will require making allusion into law and history as constituted in the 18th, 19th and partly 20th Centuries and as they affect determination of the nature and extent of the areas of sea controlled by the Kingdoms and Empires before the establishment of the Nigerian State and before UNCLOS. This calls for an examination of the development of TS as a legal concept before the coming into operation of the 1958 Geneva Convention on Territorial Sea and UNCLOS. In doing this, the concept of foreshore, which could be argued, served as the genesis of attempts by states at appropriating the sea areas adjacent to their coasts will be examined. Furthermore, mention will be made of other attempts at appropriating the sea by states such as the 'range of navigation,' 'mid-channel or thalweg,' 'limit of visibility,' 'mare liberium' and 'mare clausum.'

⁷ Brown, E.D., "its Scotland's oil," vol. 2, (1978) *Marine Policy*, pp. 3 – 21

The 'cannon shot rule' and the 'three-mile TS' concept would cap the discussion on the development of the TS concept.

On whether the authority of a coastal state over the TS is dominium, imperium, sovereignty or it is a 'bundle of servitudes'; we shall consider the various theories on the matter. We shall equally consider the practice of some states and judicial opinions on the subject. Finally, attempts will be made to examine the practice in the pre-colonial Nigeria and how the concept of TS became introduced to the legal system of Nigeria. We shall examine the practice of Nigeria regarding the nature of TS, from its independence to the present day. In doing the above, we shall carry out an in-depth study of the various maritime laws and judicial decisions so far expressed on the matter by Nigerian legislature and the judiciary.

III. Development of TS as a Legal Concept

1 The Foreshore – Property versus dominion⁸

The foreshore is discussed in this context because it formed the immediate sea area upon which the sovereignty of the coastal State according to Digges⁹ was initially asserted. It is an area of the sea between the high and low water tide adjacent to the coast of a State and upon it the Crown had for a long time asserted rights and the rights were generally acknowledged by other maritime powers. The fact that the Crown exercised or possessed some measure of rights over the foreshore was not so much in controversy, as the nature of that right. While it is believed in some quarters that the Crown's right over the foreshore is proprietary in nature, others have argued that it is dominium. For example, Boroughs in 1633 and Selden in 1635 have both traced some documents, titled *De superioritate maris Angliae et juris officii Admiralitatis in eodem* to the reign of Edward II, dating as far back as 1299, which they argued confirmed the authority of the Crown over the foreshore

⁸ Generally, see Moore, S.A., *History and Law of the Foreshore and Sea Shore and the Law Relating Thereto*, 3rd edition, (1888) p. 185; O'Connell, D.P. op. cit. vol. 1, pp. 2 – 9 and Gray, K.J., *Elements of Land Law*, Butterworth & Co. London (1987), pp. 32 - 33

⁹ Ibid

areas as being proprietary in nature.

The text of the above mentioned document was incorporated by Coke in his Fourth Institute in 1644 and was widely referred to in the 17th Century. From this time onward, other jurists such as Hale and Digges have equally made arguments in favour of the Crown's proprietary rights over the foreshore of the English seas. Thus Digges argued:

And in this estate regall of Englande wee see that the kings of most auncient times have in the right of their crowne helde the seas aboute this Iland so proper and entire unto them. Not only was the Crown's proprietary rights affirmed by jurists and the documents, there were also judicial decisions to the effect that 'the sea is the King's proper inheritance,'¹⁰ the rights were effectively presented in Ruling's case¹¹ in 1591.

The proprietary rights were found to have been exercised over fishing and proclaimed in a treaty with France in 1360. In the light of the above, the Crown had exercised acts of a property owner by the granting of parts thereof both in England and in several of the Crown's overseas Colonies to members of the public. Example of such grants by the Crown can be found in Nigeria in *Attorney General of Southern Nigeria vs. John Holt and Company (Liverpool) Ltd and others*,¹² (hereafter referred to as *AG Southern Nigeria vs. John Holt Ltd*). The respondents first obtained their title over parcels of land adjacent to the shore of Lagos from native grants. They subsequently obtained Crown grants in respect of the same parcels of land soon after the introduction of colonial rule to Lagos in 1861. At various dates after obtaining Crown grants the respondents carried out works on the foreshore in order to prevent incursions by the sea and erosion. As a result, a strip of land had been reclaimed below that which in 1861 had been high

¹⁰ Royal Piscary of the Banne (1610), Dav., p. 56a

¹¹ *Officium Domini vs. Dulinge*, cited by O'Connell supra, p. 307.

¹² (1915) AC, p. 599.

water mark. In 1907, the Government of Lagos began the construction of a public road, which ran across the strip of land mentioned above. The respondents brought the action against the Attorney General to recover compensation. The court held that “the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore...”¹³ In conclusion it appears that Nigeria also followed the proprietary doctrine introduced by Britain.

2 Accretion

Since the boundary between the lands adjoining navigable rivers may be altered in one way or another by the forces of nature caused by the adjoining sea, it is necessary to examine the concept of accretion and subsequently avulsion in order to determine the implications of their occurrence on the boundary of the adjoining land. The rights and title of the Crown in the foreshore were in relatively rare cases affected by the concepts of accretion and avulsion, which operated to either add or take away depending on the circumstances, a portion of the Crown’s territory in the foreshore. Both concepts apply as a matter of fairness and convenience. They are however different one from the other but they both occur as a result of forces of nature, which alter or change the course of the boundary between the land and the water.

In the case of accretion for example, if the forces of nature had the effect of silting up the adjoining land by a gradual and imperceptible deposition of alluvium, the law considers the addition as forming part of the adjoining land.¹⁴ If on the other hand, gradual and imperceptible incursions and encroachments were made through erosion or diluvium caused by the forces of advancing waters of the sea on the adjoining land, the owner of the land loses the affected part of his land to the Crown as the owner of the foreshore.

¹³ Ibid at p.600

¹⁴ Attorney General vs. McCarthy (1911) 2 IR, 260 at 277; Port Franks Property Ltd vs. The Queen (1980) D.L.R. (3d) p. 28 at p.36.

However any changes caused by the deliberate action of the owner of the adjoining land have been held to fall outside the doctrine of accretion.¹⁵

Furthermore, apart from mere addition of a strip of land to the adjoining land, the process described above has the capacity of creating completely new islands, ownership of which may depend *inter alia* on the distance of the island to the shore. This process provided an avenue to extended maritime claims beyond the foreshore originally conceded to the Crown. Thus it is observed as follows:

“The natural process which creates alluviums on the shore and banks, and deltas at the mouth of rivers, together with other processes, may lead to the birth of new islands. If they arise on the high seas outside the territorial maritime belt, they belong to no state, and may be acquired through occupation on the part of any state. But if they arise in rivers, lakes, or within the maritime belt, they are, according to the law of nations, considered accretions to the neighbouring land.”¹⁶

3. Avulsion

Avulsion may be regarded as the opposite of accretion. It is where substantial and recognisable changes in boundary of land adjoining the sea or river occurred suddenly, either naturally or as a result of man-made changes, the boundary remains at the original position without any shift or alteration thereof. This implies that the foreshore rights of the Crown remained unaffected whenever an avulsion occurred.

IV Development of the Breadth of TS

This aspect of the study investigates the developments leading to the adoption of three-miles TS as a legal concept by the major maritime nations and whether the concept was introduced to Nigeria or not. This aspect is important because without the knowledge of the breadth of the TS in the periods, it would be difficult to

¹⁵ Southern Theosophy Inc. vs. State of South Australia (supra), at p. 720

¹⁶ Lauterpacht, H., ed. *Oppenheim's International Law*, vol. 1, (8th ed.), Longmans, Green and Co., London, p. 565, § 234F

determine the extent of sea areas controlled by the Kingdoms and Empires that today make up the coastal units of Nigeria and whether they brought the sea areas controlled at that time into the colonization and subsequently into the union of Nigeria or not. This will no doubt help in any likely recommendation that would be made at the end of discussions on the issues.

1 Mare Liberum versus Mare Clausum¹⁷

The forces of nature have both expansive and diminutive effects on the foreshore rights of the Crown. The expansive effect pushes the foreshore rights of the Crown further into the sea and where forces of nature have the effect of creating islands close to the shore, the Crown gains the more with its foreshore title rights extending from the foreshore of the mainland to that of the adjacent islands. Thus rights over the adjacent sea areas began to expand little by little. The above coupled with the claims of the Spanish over the Pacific Ocean and the Gulf of Mexico and the claim of Portugal over the Atlantic south of Morocco and the Indian Ocean, led to the formulation of theories regarding the breadth of the TS. Similarly, other great maritime powers such as England, Venice, the Papacy and Turkey claimed the right to close the seas adjacent to their coasts. All the above nations sought to exclude foreign ships from navigating on the areas of the sea claimed by each of them hence the theories.

The first in the category of theories is “mare liberum” adumbrated or written by Hugo Grotius in 1608. Grotius as a young Dutch scholar and a lawyer wrote mare liberum on a retainership basis by the Dutch East India Company. His preoccupation in writing mare liberum was to defend the rights of the Dutch to participate in the East Indian trade.¹⁸ Thus his thesis centres mainly on the argument that the seas and oceans of the world are free to the whole world and as a result cannot be subjected to State or private ownership or appropriation. Grotius’

¹⁷ See O’Connell D.P., vol. 1, op. cit, at pp. 1-24; Lumb R.D. and Phil D., “Sovereignty and Jurisdiction Over Australian Waters,” vol. 43 (1969), *The Australian Law Journal*, pp.421 - 426

¹⁸ Grotius, H., *The Freedom of the Seas or the Right which belongs to the Dutch to Take Part in the East India Trade*, (Ed. Scott, trans. Van Deman Magoffin) (Oxford University Press, 1916), ix

writings impacted in no small measure on the present day freedom of the high seas.

However, a decade after Grotius, Selden, an English scholar wrote *Mare Clausum* to counter Grotius' *Mare Liberum* theory. The purpose of his *Mare Clausum* theory was to first and foremost defend the claims of England over the adjacent seas and by so doing, Selden argued that contrary to the views earlier expressed on the issue, the seas and oceans could in-fact be owned and appropriated by the maritime power whose coasts the seas adjoin. In order to drive his argument to a logical and acceptable conclusion, Selden had recourse to Biblical records, which is to the effect of the love of God in giving the earth and the seas and oceans thereof to Noah. It has been argued that Grotius' *mare liberum* overcame Selden's *mare clausum* and that it did not see the light of the day. Hence, James Brown Scott commented as follows:

In this argument of books...the Dutch Scholar has had the better of his English antagonist...the *Mare Liberum* is still an open book, the *Mare Clausum*, is indeed a closed one, and as flotsam and jetsam on troubled waters, [*Mare Liberum*] rides the waves, whereas its rival, heavy and water-logged, has gone under.¹⁹

This argument cannot be totally supported. This is so because it fails to reckon with the historical evolution of the TS, which no doubt received impetus from Selden's *Mare Clausum*. Contrary to Scott's argument therefore, claims to portions of the sea by States continued unabated notwithstanding Grotius' *Mare Liberum* theory. Thus Fulton observes that:

But it is also as firmly established that all states possess sovereign rights in those parts of the sea which wash their shores... There has been another movement in the opposite direction, by which the exclusive rights of maritime states in the waters immediately adjoining their coasts have come to be more clearly recognised and definitely incorporated in international law.²⁰

¹⁹ Ibid

²⁰ Fulton, T.W., *The Sovereignty of the Sea*, Edinburgh (1911) reprinted by New York State Library second ed (1976), p. 537; Colombos C.J., *the International Law of the Sea* (6th ed.) Longmans Green & Co., London (1967), pp. 91 - 101

It can therefore be argued that while Grotius' theory impacted on the current idea of the freedom of the high seas, Selden's mare clausum on the other hand influenced the evolution of TS as a legal concept by strengthening the claims of the British over the adjacent sea areas.

2 The Cannon Shot Rule versus three-mile TS limit

Selden in his Mare Clausum did not state the specific dimension of the sea area that a maritime State could in-fact close neither did Grotius foreclose the possibility of every maritime State's entitlement over a portion of the sea adjoining its coast for defence and security. Thus vague criteria, such as "range of navigation," "mid-channel or thalweg," were adopted by maritime States to define the limit of TS being claimed. This was followed by "limit of visibility," which Bynkershoek criticised, would vary according to the position of the observer, the keenness of his vision, the climate, and many other circumstances.²¹ The limit of visibility was closely followed, between the 17th and 18th Centuries by the "cannon shot rule," which is generally associated with Grotius. By that rule, the belt of sea along the coast which could be actually commanded and controlled by the range of artillery fired from the shore was regarded as the TS of the adjoining State. Beyond this range, the sea was high seas and was regarded as *res communis* that is free and belonging to the whole world. Thus Marshall CJ in *Church vs. Hubbard* stated as follows: "The seizure of a vessel within the range of its cannons by a foreign force is an invasion of that territory..."²²

The cannon shot rule may be criticised in several ways. The first is its actual range, which may differ from country to country and on the type of the cannon involved. Secondly, by basing possession of maritime territory on force of arms, cannon shot rule may be taken to have foreclosed the possibility of possession of maritime territory by States which did not at that time possess such force of arms. It in fact failed to state the parameters by which such States might measure or determine the

²¹ Ibid, p. 546

²² 6 US 2(Cranch) at p.234, 2 L. ed. at p. 264

area of sea they could close. Thirdly, cannon shot rule appeared to have more practicality in States that possessed it than in States that did not. Thus cannon shot rule failed to explain the yardstick for measuring the TS of coastal States that did not possess cannon. The above impression was however corrected by Gundling in 1734, when he asserted for the first time the notion that the cannon shot rule applied where there was in fact no actual cannon.²³

The indeterminate nature of the cannon shot rule led to the suggestion by Galiani in 1782 for its replacement by a more convenient and ascertainable distance. He suggested that the cannon shot rule be replaced by a three-mile TS limit, which invariably was the farthest distance that an average cannon fired from the coast could reach at that time. The three – mile limit became widely accepted by most maritime nations. This probably led Sir William Scott (later Lord Stowell) in ‘*The Anna case*’, a case regarded as one of the most authoritative early expositions of the three – mile territorial waters rule to comment as follows; “we all know that the rule of law on this subject is *terrae dominium finitur, ubi finitur armorum vis*,” and since introduction of fire arms, that distance has usually been recognised to be about three miles from the shore.”²⁴

3 The doctrine and practice regarding the three-mile TS

3.1 Britain and the United States

Britain was to the fore among the early claimers of the three-mile TS, through the Custom Consolidation Act of 1876, which brought to an end the Hovering Acts under which a certain measure of control over smugglers was exercised up to twelve miles from the coast. The United States adopted the three – mile rule in 1793 by the Congress’ enactment of Neutrality Act of 5th June 1794, which declared its neutrality in the war of the coalition between Britain and France. The enactment according to O’Connell was necessitated by the difficulties that attended the capture of a vessel within the American coasts by the belligerents. That Act granted the US

²³ O’Connell, op. cit., note 1, p.321

²⁴ (1805) 5 C Rob 373; 165 ER 809

District Courts the jurisdiction to determine complaints in the cases of captures made within the waters of the United States or within a marine league of the coasts.²⁵

Among many incidents, two separate ones stand out to demonstrate the commitment of Britain and the United States to the idea of three-mile TS. The first of the incidents happened in 1863, when the United States Consul (Mr. Graham) at Cape Town, demanded the release of the Federal merchant vessel, the *Sea Bride*, which had been captured by the confederate cruiser *Alabama* within four miles of the shore, but outside the three-mile limit. He based his demand upon the doctrine that, since the invention of rifled cannon, territorial waters extended to at least six miles. The British Governor of Cape Colony declined to interfere, holding that the “rule of the marine league held good.”²⁶ It should be noted that Mr. Graham’s action in trying to seek the release of the vessel was not seriously supported by his Government; and in the second incident in 1875 the United States joined Great Britain in strenuously resisting the repeated claim of Spain to a six mile zone off the coasts of Cuba, a claim denied again in 1880 when Spain attempted to reassert the claim again.²⁷

3.2 Other States

There were other states that claimed distances, which were at variance with the three-mile limit. The Scandinavian States for example did not employ the cannon shot rule but instead claimed maritime dominium over fixed distances from the shore along the whole coastline, regardless of the actual presence or absence of shore batteries.²⁸ These however gradually reduced to four miles Scandinavian ‘league’ by the middle of 18th Century. The French and the Russians too did not claim three miles TS.

²⁵ U.S. Statutes at Large, 384

²⁶ British State Papers, North America, United States (1964), LXIL, PP. 19-29; Lawrence, T.J., *Principles of International Law*, London (1895), p.139

²⁷ Wharton, F., *A Digest of International Law of the United States*, 3 vols., Edinburgh Review (1887) pp. 32 et. Seq., 327

²⁸ Churchill R.R., Lowe, A.V., *The Law of the Sea*, Manchester University Press 3rd ed. (1999), p. 78

The concerted efforts of Britain and America at ensuring the observance of the three-mile rule by other States, coupled with the number of other States that have adopted the three-mile rule must have informed Lawrence' conclusion that, "It may be taken for granted that, in spite of a few tentative efforts at alteration, the rule of the three-mile limit is part and parcel of modern international law."²⁹ Lowe and Churchill on the other hand agree that the three-mile TS was never unanimously accepted.³⁰ It must be pointed out however, that the three mile TS lacked unanimity as argued by Lowe and Churchill, the practice too could be argued not to be widespread enough as to have given rise to customary international law status. The truth however, is that anywhere the question of development of the TS as a legal concept is discussed, reference will always be made to the three-mile concept. Furthermore, the acceptance by the learned Professors that the three mile TS was adhered to by most of the major maritime powers including Britain, which was at that time the colonial overlord of Nigeria, coupled with the fact that other States indeed claimed varying distances are enough to further buttress the argument that the low-water mark, which the *Franconia case* (hereafter referred to as *R vs. Keyn*),³¹ *Harris vs. Owners of Franconia*,³² (a case which emanated from *R vs. Keyn*) and subsequently the Nigerian case of *Abia case* say was the limit of national territory is after all not the true limit of national territory. The question to be asked is: How does the non-unanimity of the three mile limit affect the limit of national territory? The answer is that it did affect it. This is made clear for example, by the fact that in countries such as Britain, the United States and others, where the three miles limit was unquestionably adopted and in the colonies and overseas territories where the practice was later introduced, the low-water mark adjudged by the *R vs. Keyn* and the *Abia case* to be the limit of national territory no doubt, can no longer be the limit of national territory.

²⁹ Ibid.

³⁰ Ibid, at p.78

³¹ (1876)2 Ex. D. pp. 63 - 75

³² (1877)3 C.P.D. 173 at p. 177.

From 1900 onward therefore, the practice of claiming three- mile territorial waters gained more acceptances, to the extent that those States that initially claimed wider distances began to abandon them in favour of the three-mile TS. Thus, Elihu Root commented as follows:

These vague and unfounded claims (of the 18th, 17th and earlier centuries) disappeared entirely, and there was nothing of them left... But the new principle of freedom, when it approached the shore, it met with another principle, the principle of protection, not a residuum of the old claim ... Warships may not pass without consent into the zone, because they threaten. Merchant ships may pass and re pass because they do not threaten.”³³

The above clearly shows the process that the three-mile TS claim went through before it became finally accepted by a number of major maritime nations. Efforts made at formulating a universally acceptable territorial limit did not yield the desired results and hence, the inability of the 1958 Geneva Convention on Territorial Sea to fix a particular TS limit. It is important to note however, that debates leading to the 1958 Convention clearly indicate a growing desire among maritime nations for extended TS. The desire was necessitated, according to Ganz, by “economic, political and military sense, a change from the old “three mile rule” was long over due; “cannon shot rule” ceased to have practicality more than two generations ago.”³⁴ It was only in 1982, that States through UNCLOS of that year were able to resolve the controversy surrounding the dimension of TS, which is now settled at 12 nm. Although UNCLOS provides in Article 2 for a definite answer to the question of nature of the TS, the true juridical nature of TS still is disputed in Nigeria and in some federal coastal States and can only be resolved by domestic laws claiming the actual rights granted States by international law.

³³ North Atlantic Fisheries Arbitration, 11th Proceedings, p. 2006.

³⁴ Ganz, D. L., “The United Nations and the Law of the Sea” vol. 26 (1977) *I.C.L.Q.* p. 1 et. Seq., 19

V. The Juridical Nature of TS

1 General comment

The 1958 Geneva Convention on Territorial Sea and the 1982 UNCLOS categorically declare the legal status of TS by stating in clear terms that “sovereignty of a coastal state extends, beyond its land territory and internal waters ...to an adjacent belt of sea, described as the TS.” Paragraph 1 of the Commentary of the International Law Commission on article 1 of its 1956 draft indicates very clearly that the rights of coastal States referred to in Article 1 of the Geneva Convention over the TS do not differ in nature from the right of sovereignty the coastal State possesses over the land territory. With the declaration in the Geneva Convention, it was anticipated that the controversy, which had existed for many centuries regarding the nature of TS, would have subsided, but the reverse is the case. There are those (such as La Pradelle, Salmond J.W., Hegel and others) that still express skepticism as to whether or not TS forms part of the territory of a coastal State, so that it exercises power of dominium and imperium over it. The Supreme Court of Nigeria in *Abia case*, for example, is of the opinion that the territory of Nigeria ends at low-water mark and that the TS is not an extension of Nigeria’s land territory and as a result it does not form part of Nigeria’s national territory. The Court was of the opinion that all that international law granted Nigeria over the TS is power to exercise sovereignty over its seabed, subsoil and the airspace above it but that it does not constitute an extension of Nigeria’s land territory.³⁵

The conclusion above is so fraught with legal uncertainties that the decision could best be described as erroneous. Firstly, the decision is erroneous because it is contrary to the provisions of Article 2(1) of UNCLOS, which grants sovereignty over the TS to coastal States. Secondly, the decision is erroneous because in arriving at the decision, the Supreme Court literally placed reliance on the *R vs. Keyn* case, the Submerged Lands Act case of (*State of New South Wales and others*

³⁵ Supra, pp. 730 – 731.

vs. the Commonwealth of Australia)³⁶, the Canadian case of *Reference Re Ownership of Offshore Mineral Rights*³⁷ and the case of *United States vs. Louisiana*³⁸ and others which, no doubt are contrary to earlier authorities, such as *Benest vs. Pipon*,³⁹ *A.G vs. Chambers*⁴⁰ and to later decisions of the *Secretary of State for India vs. Chelikani Rama Rao*⁴¹ and *Lord Advocate vs. Wemyss*,⁴² *AG. of Southern Nigeria vs John Holt and company (Liverpool Ltd.)*.⁴³

Like similar controversy over the limits of TS, several writings by notable jurists, such as Hale M., D.P. O'Connell, Salmond J.W., Westlake J. and La Pradelle etc. have been made and several theories, such as La Pradelle's servitude theory, Kelsen, Hegel and property theory have also been propounded in-order to explain the actual nature of TS. The arguments focused principally on whether the authority of a coastal State over the three-mile TS was that of dominium so that the state possesses only property rights over it or whether it was imperium so that the coastal State possesses only the rights of jurisdiction or whether the authority was that of sovereignty so that the State possesses both dominium and imperium over it. On the other hand, others have argued that the authority of a coastal State over the TS was none of the above, but that it was a mere 'bundle of servitudes.' To find out the true nature of TS therefore, there is a need to examine some of the writings and theories, followed by the practice of some states on the issue. There is also a need to examine the various judicial decisions on the issue.

2. TS as a 'bundle of servitudes'

The argument that the TS is a 'bundle of servitudes' may be viewed in two different but related perspectives. The first is with regard to the coastal State and the second has to do with the right of innocent passage over the TS.

³⁶ (1975) 50 Australian Law Journal Reports, 218

³⁷ 65 Dominion Law Reports (2nd edition) 353; (1967) D.L.R. 2027

³⁸ 332 US 19; 67 US Reporter 1658

³⁹ (1829) 1 Knapp. 60; 12 E.R. 243

⁴⁰ (1854) 4 De G.M. and G. 206; 43 E.R. 486

⁴¹ (1916) 85 LJPC 222

⁴² (1900) A.C. 48

⁴³ (1915) A.C. 599

2.1 Coastal State's perspective

In order to properly explain the term 'bundle of servitudes,' there is the need to understand the meaning of the term. 'Bundle of servitudes' may be seen as a coinage derived from "international servitudes," which has been used generally to describe the several restrictions of sovereignty or restrictions of territorial sovereignty. It is a right exercised by one State in the territory of another State, thus the term is heavily dependent for its exercise upon what meaning is ascribed to the concept of territorial sovereignty. This is so because international servitudes, by its character and operation had to be attached to a certain territory within a foreign State before it can be regarded as such. Thus it has been argued that the confederacy type of multilateral agreements, such as seen in the North Atlantic Treaty Organization of 17th March, 1948, the Brussels Treaty Organization of 4th of April, 1948 and the Western European Union Treaty signed in Paris on the 23rd of October, 1954 do not constitute foreign territory when the troops of one member State are stationed in the territory of another member State.⁴⁴ Thus before it can constitute foreign restriction or right in a foreign land, the sovereignty of the Grantor over the territory must be proven and its consent to the grant secured through bilateral or multilateral agreement or according to the *Right of Passage case* by custom.⁴⁵ According to Vattel such restrictions or foreign rights depend to a large extent on the consent of the affected foreign States. Thus he stated;

"There exists no reason why a nation, or a sovereign, if authorized by the laws, may not grant various privileges in their territories to another nation, ... When once these rights have been validly ceded, they constitute a part of the possessions of him who has acquired them, and ought to be respected in the same manner as his former possessions."⁴⁶

The totality of such rights according to Vali was necessitated by vital economic and

⁴⁴ Vali, F. A., *Servitudes of International Law: a Study of rights in foreign territory* (second edition) Stevenson & Sons, London (1958), p. 33

⁴⁵ (1960), ICJ Report, p. 4, et. Seq., 9

⁴⁶ Vattel, E., *The Law of Nations, or Principles of the Law of Nature, applied to the conduct and affairs of nations and sovereigns*, London (1714 – 1767)

other interests, which in modern times are equally responsible for the exercise of similar rights by one state in the territory of another state, such as the erection of a free zone round the canton of Geneva or an outlet to the sea for a land-locked country.⁴⁷

Judging from the above, the right of innocent passage enjoyed by States over the TS would qualify as bundle of Servitudes. However, La Pradelle who propounded the theory of bundle of servitude has a contrary view of the matter. In La Pradelle's view the TS did not belong to any State because it was *res communis*, hence any rights exercised by States over it constitute bundle of servitudes not to coastal States but to the sea which it had to bear.⁴⁸ In rejecting the idea of a coastal State's sovereignty, La Pradelle argued that a coastal State cannot cede its TS without similarly ceding the coast, and could not prohibit belligerents from engaging within the cannon range of TS. He also held that a coastal State could not tax a vessel in transits and could not exercise criminal jurisdiction over offences committed on board foreign vessels or over collision that occurred within the TS.⁴⁹

Firstly, this theory can no longer hold sway having been propounded in 1898 – a time when the idea that the three-mile TS formed part of the national territory of a coastal State had gained wide acceptances by majority of coastal States. As will be shown later, La Pradelle's arguments that a coastal State could not cede its TS, without similarly ceding its coast is already overtaken by the Hay-Bunau-Varilla Treaty of 1903 between Panama and the United States. The argument that a coastal State could not prohibit belligerents from exercising over the TS has been overtaken by the fact that, prior to his theory, the United States Congress had enacted the Neutrality Act of 1794, which prohibited belligerents from engaging within the three-mile TS of the country. Similarly flawed, are La Pradelle's arguments that a coastal State could not exercise criminal jurisdiction or tax vessels in transit within

⁴⁷ Vali, F.A., op. cit. n. 35, p. 33

⁴⁸ De Lapradelle, A.G. *Le Droit del l'Etat sur la mer territoriale*, Revue Générale de droit international public, Paris (1898), 264 – 268, 309 – 347(1898); See also Churchill and Lowe, op. cit., pp. 72 – 73 and O'Connell, op. cit., vol.1, pp. 68 - 71

⁴⁹ O'Connell, op. cit., vol. I, pp. 68 - 71

the TS. It is not in all cases that a coastal State could not tax vessels or exercise criminal jurisdiction over offences committed within the TS. The requirement and enforcement of payment of ship money and salute of the British Flag by foreign vessels passing within the British TS have rendered the above argument baseless. No wonder O'Connell described it as being "technically inept..."⁵⁰

The questions to be asked are these: (a) is there any servitude at all on the TS. (b) If there is, who bears the burden? (c) What effect does the right of innocent passage have on the nature of the TS? The questions will be discussed under the perspective of innocent passage.

2.2 The perspective of innocent passage

Firstly, the right of innocent passage may be seen as an international servitude in that it is a burden which the coastal State must bear, but is generally not seen as such and is seen as a right of third States for specific reasons. The first is that the right of innocent passage like other rights in foreign lands described above existed formerly as customary international law right, but which by the Geneva Convention and UNCLOS now exists based on multilateral agreement, thus the consent of the coastal States may be argued to have been secured by the multilateral agreement. Secondly, the TS upon which the right of innocent passage is to be exercised is a foreign territory to third states, judging by the fact that article 2 of UNCLOS says that it is the same sovereignty, which a coastal State exercises over its land territory that extends to the TS. Therefore, vessels of another State exercising the right of innocent passage through the TS of another coastal State can be seen as exercising the same over a foreign territory. Thirdly, judging from the statement of Vattel above the right of innocent passage may also be argued to constitute a restriction or burden on the rights of the coastal States over the TS and to that extent it is an international servitude. Lastly, it may be argued that the same economic and political reasons, which informed the formation of international servitudes, also contributed to the granting of the right of innocent passage to States over the TS.

⁵⁰ Ibid.

History and tradition being, the primary reasons for the development of the concept.

With regards to question (b), it may be argued that contrary to La Pradelle's view above, it is the coastal State that bears the burden of innocent passage being an international servitude, although it is not generally seen as such, it seen as a right of third States exercised for specific reasons.

On the question of the effect of the right of innocent passage being international servitudes on the nature of TS, the argument could be made based on the provisions of Article 19(2) and 25(1) of UNCLOS, that even if the right of innocent passage constituted a bundle of servitudes, in practice, that fact alone has not had a major diminutive effect on the sovereignty granted coastal States by UNCLOS, since a coastal State by virtue of these provisions is empowered to suspend passages which are not innocent. For one thing, innocent passage is expected to be conducted as expeditiously as is practicable and for another, it is not the case that the vessels are to be stationed permanently over the TS as seen in other international servitudes, such as the establishment and stationing of troops on foreign soil, which operate more or less on a permanent basis. Even the exclusive jurisdiction granted the vessels of war of a foreign sovereign at peace with a coastal State and which is demeaning herself in a friendly manner as seen in the case of the *Schooner Exchange vs. McFaddon*⁵¹ still does not detract from the territorial sovereignty of the coastal State. This is so because the Grantor State in the case of military bases and the coastal State on whose territorial waters a foreign vessel finds itself wishes to exercise some measures of authority and jurisdiction, especially jurisdiction over criminal matters.⁵² This attitude is demonstrated in the jurisdictional arrangements included in the Long-Range Proving Ground Treaty for the Bahamas and which were later extended to the United States bases in British possessions.⁵³ Thus, the legislative powers of a coastal State over the TS are preserved by article 21 and it is

⁵¹ 7 Cranch (1812), p. 116

⁵² *Coleman vs. Tennessee* (1879) 97 US 509, 24 L. Ed. 1118; *Dow vs. Johnson* (1880) 100, US 158, 25 L. Ed. 632

⁵³ *Ibid*, p. 213

the coastal State alone that has the power to harness the resources of the zone. Furthermore, there is no similar right of over flight over the TS and submerged vessels are required to navigate on top the TS and also show their flags and not in accordance with their normal mode of navigating by way of submerging.

3. Other theoretical approaches to nature of TS

Amongst the various theories, three separate ones stood out to explain the juridical nature of the TS in connection with the Crown's ownership of it. Two of those theories are in support of the Crown's ownership of the TS. The first of the theories may be termed, 'property theory' and the purport of it is that power is the basis of ownership of property and that territory and property were in essence one, so that sovereignty and jurisdiction were really identical. According to this theory, there is no distinction in principle between bays, roadsteads, harbours and the marginal sea; they were all subjected to the authority of the coastal state in virtue of the fact of its exclusive power, so that they became property of the coastal sovereign from which he could at anytime exclude all alien shipping.⁵⁴

For the above reasons, cases that were decided by the English courts proceeded on the basis of Crown ownership of the TS. These cases served as authority on the matter before *R vs. Keyn*,⁵⁵ case which some people e.g. Sir Cecil Hurst⁵⁶ and Salmond J.⁵⁷ have argued (though not conclusively) overruled the property theory of the TS. The right of innocent passage, which was viewed in many quarters as being contrary to the perceived notion of ownership of the TS by the Crown in the middle of 19 century, has been argued to have diminished the importance of the theory. The Hegelian theory of state, which came after it led to the revision of property theory and the question of sovereignty for which it stood.

3.1 Hegel's Theory

⁵⁴ O'Connell, D.P., "The Federal Problem Concerning Maritime Domain in Commonwealth Countries," vol. 1, No. 3 (1969 – 70) *Journal of Maritime Law and Commerce*, pp. 389 - 413

⁵⁵ *Supra*, n. 31

⁵⁶ (1922 – 23) B.Y.I.L. p. 45

⁵⁷ Salmond J. W., "Territorial Waters," vol. 34, (1918), *Law Quarterly Review*, pp. 235 - 236

This theory provides a revisit of sovereignty over the TS, the ownership of which the property theory noted above ascribed to the Crown. By so doing, Hegelian theory attempts to separate sovereignty from ownership, the two concepts of which the earlier theory had regarded as one and the same. Therefore, instead of the theory to regard sovereignty as a part of ownership, the two concepts were regarded as an aggregation of faculties of which territory is merely the physical element of its exercise. The impact of this theory immediately spread to Germany and to England due to the fact that it was propounded at a time when Hegelian and generally speaking German legal influences were strong in England. However, in England the theory was confronted by controversies emanating first from the fact of common law and second from the myriad of judicial precedents which adherence to the earlier theory had necessitated. The fact of common law is that to its lawyers, as opposed to civil law lawyers, sovereignty and property are two inseparable words, which have had significant influence in the legal system of most common law countries. Hegelian theory with its sentiments in favour of TS not being part of national territory is therefore flawed.⁵⁸

3.2 Kelsen's theory

The third theory is Kelsen's theory, which has provided a corroborative support to the property theory. The theory was championed by the Vienna School, represented by Kelsen, hence the reference to it as Kelsen's theory. According to this theory, the TS could be regarded as forming part of the national territory of a coastal state. That is, a coastal state may exercise acts of sovereignty over it. However, O'Connell has sounded a note of warning on the usage of the word 'sovereignty' to describe the right or power of a state over the TS. According to him, that word conveys different meanings, depending on whether it is being used by common law lawyers or by a continental lawyer. The word sovereignty does not possess absolute connotation for all continental lawyers that it tends to have for common law lawyers.⁵⁹ This warning would seem to be unnecessary in view of the fact that UNCLOS, in

⁵⁸ O'Connell, D.P.O., op. cit. n. 46, p. 394

⁵⁹ Ibid, at p. 395

granting sovereignty over the TS to coastal States does not distinguish between the common law and the civil law States and the current practice of States does not seem to make such distinction. Thus, like the theories earlier examined, both the property and Kelsen's theories found a common agreement on the proprietary rights of the coastal State over the adjacent TS.

3.3 Other Jurists

Some other writers have equally expressed opinion on the nature of the TS. Hale, in asserting the proprietary rights over the TS stated that:

The narrow sea adjoining to the coast of England is part of the waste and demesnes and dominions of the King of England, whether it lie within the body of any county or not. In this sea the King of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership.⁶⁰

In the opinion of Professor O'Connell, "after 1900 the controversy surrounding the juridical nature of the territorial sea waned and scarcely any author took issue with the notion that territorial sea is subject to sovereignty."⁶¹

Westlake on his part, restated the Crown's proprietary rights over the seabed when he stated that, "within that extent the water and its bed are territorial and the wealth of both is the property of the territorial sovereign."⁶²

Sir Cecil Hurst, the British Foreign Office Legal Adviser who had earlier written an article in which he stated that 'the decision in *R vs. Keyn* case showed clearly that the territorial waters were not part of the national territory,'⁶³ wrote another article entitled, *whose is the Bed of the Sea? Sedentary Fisheries outside the Three-Mile Limit*, in which he analysed the status of the maritime territory situated beyond and within the three miles from the coast. He concluded by saying:

⁶⁰ Hale, M., *Dejure Maris* (1670) in Moore, S.A., *History and Law of the Foreshore and Sea Shore and the Law Relating Thereto*, 3rd ed., chapt. Iv, Stevens and Haynes, London, (1888)

⁶¹ O'Connell, D.P., "The Juridical Nature of the Territorial Sea," vol. XLV, (1971), *B.Y.I.L.*, p.45 at 343

⁶² Westlake, J., *International Law*, Part I, Cambridge University Press, (1910), p. 188.

⁶³ (1922 – 23) *B.Y.I.L.* 3 p. 45

...so far as Great Britain at any rate is concerned, ownership of the bed of the sea within the three –mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea....⁶⁴

Jessup at the conclusion of his chapter dealing with “sovereignty over Territorial Waters” expresses the more modern views on the nature of the TS when he stated:

It is believed that the above pages have demonstrated that the littoral sovereign has over territorial waters rights, powers and privileges which are in principle the same as those which he possesses on his land territories...It may therefore be said that the state is sovereign over its territorial waters.⁶⁵

The sovereignty advocated by Jessup finds international support in the 1919 Paris Conference on a Convention for the Regulation of Aerial Navigation (Paris Convention) and in the Convention on International Civil Aviation (the Chicago Convention) of 1944. Though the 1919 Paris Convention is specifically designed for the air space over the territory of a state, Article 1 thereof extended the sovereignty of a coastal state to include the TS. Article I provides:

... For the purpose of the present convention, the territory of a state shall be understood as including the national territory...and the territorial waters adjacent thereto.⁶⁶

In comparison, the Chicago Convention of 1944 in its Article 2 similarly defines the territory of a State by stating that: For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

⁶⁴ Ibid, p. 34 – 43.

⁶⁵ Jessup, P. C., *The Law of the Territorial Waters and Maritime Jurisdiction*, (1927); New York, Klaus reprint, (1970), p. 208.

⁶⁶ BFSP, vol. 112, p. 931. See also Martial, J.A., “State Control of the Air Space over the Territorial Sea and the Contiguous Zone,” vol. 30 (1952) *Canadian Bar Review*, p. 245.

The importance of Article 1 of the 1919 Paris Convention can be better appreciated if it is considered that prior to the adoption of the Convention itself by the initial thirty two nations, the emphasis on the sovereignty over the TS was then on the water column, but the coming into effect of this convention brought the issue of the airspace above the water column of the TS to the fore. Thus, in the words of Marston:

Not only was the territorial sea deemed to be part of the national territory but it was now possible to envisage the marginal sea as part of a column of sovereignty extending upwards into the airspace...⁶⁷

Theoretically therefore, there is overwhelming evidence in support of coastal States power of dominium and imperium over the adjacent TS, its airspace, the sea-bed and the subsoil thereof. The next task is to explore further evidence from States practice.

VI. The practice regarding the nature of TS

1. General comment

In this subsection, the executive, legislative and judicial practices of a few selected States regarding the juridical nature of the TS will be examined. These include, Britain, the US, India and Australia.

2. British State Practice

2.1 Executive and legislative measures

In Britain the claims to sovereignty or dominium over the TS were initially manifested in two significant respects. In the early 17th Century for example, there was the requirement for the payment of tribute or ship money by foreign ships within what was then regarded as the British seas. In order to further concretise the claims to sovereignty over the TS, the British Parliament issued instructions

⁶⁷ Marston, G., "The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea," vol. XLVIII (1976 – 7), *B.Y.I.L.* p. 325-6

requiring naval commanders to compel payment of homage to the British flag by the striking of the flag by foreign ships entering the British seas. A refusal to honour the requirement *inter alia* led to the first Dutch war in the middle of 17th Century between Britain and Sweden and the result of the war demonstrated beyond doubt that after all England possessed the actual dominion of the seas by reason of her naval power.⁶⁸ The payment of ship money and the striking of the flag were regarded necessary for maintaining the sovereignty of the Crown over the TS. Thus, in the negotiations that followed, Britain consistently put forward the recognition of her rights to herring fishery and the striking of the flag as preconditions to the signing of a peace treaty.

Consistent with the policy of extending her sovereignty to the TS, Britain enacted the Merchant Shipping Act of 1854, which is generally regarded as affirming the doctrine that the TS forms part of the territory of United Kingdom.⁶⁹ This was followed by another law known as the Cornwall Submarine Mines Act of 1858, which equally made provisions acknowledging the Crown's proprietary rights over the mines and minerals lying below low-water mark under the open sea adjacent to the county of Cornwall.⁷⁰ It may be argued that the Cornwall Submarine Mines Act applied only to Cornwall and to the specific dispute between the Crown and the Duchy of Cornwall, but it must be remembered that the County of Cornwall forms part of the larger United Kingdom and by that enactment it may be that Parliament has committed itself to the proposition that the sea-bed below low-water mark of not only the county of Cornwall but also the entire United Kingdom is vested in the Crown.

This proposition is re-affirmed in Section 7 of Crown Lands Act 1866, which contains similar provisions as in the Cornwall Submarine Mines Act of 1858. Again, Britain after the decision in *R vs. Keyn* enacted the Territorial Waters Jurisdiction Act of 1878, to correct the erroneous impression that the territory of Britain ends at

⁶⁸ Fulton, op. cit. note 20, pp. 378 - 413

⁶⁹ 17 & 18 Vict. C. 104, section 527

⁷⁰ Section 2 of 1858 (now repealed)

low-water mark, which *R vs. Keyn* represented.⁷¹ The position was further confirmed by international documents in which Britain was a party. Example of such international document is the North Sea Fisheries Convention of 1882, which defined territorial waters as those which came within three miles, measured from low-water mark along the coast of each of the signatory powers.⁷² Thus, Britain has again confirmed by both executive measures and statutory provisions its dominium and imperium powers over the adjacent TS adjacent.

2.2 Judicial Practice

Ownership of maritime territory below low water mark was long before the *R vs. Keyn case* ascribed to the Crown. This view is supported by a number of judicial decisions long before and also after the decision in *R vs. Keyn*. The view became reinvigorated in the 18th Century, during which time several judicial decisions were rendered in favour of three-mile TS. At that time, the idea that three miles represent limit of effective gun fire from the shore was adopted by both Britain and the United States as the most satisfactory and effective formula, this practice for instance, found acceptance in *The Twee Gebroeders*⁷³ and in *The Leda*.⁷⁴ In the *Leda* for example, the Admiralty Court held that the expression ‘territorial limits of the United Kingdom’ could only be interpreted to mean ‘the land of the United Kingdom and three miles from the shore’.⁷⁵ In a related development, the Privy Council in *Benest vs. Pipon*,⁷⁶ a decision which was handed down long before the *R vs. Keyn* and which rejected a claim by the lord of a manor in Jersey to be exclusively entitled to harvest seaweed from rocks beyond the low-water mark. Lord Wynford declared, “The Sea is the property of the king, and so is the land beneath it.”⁷⁷

Similar views were also expressed in *Lord Fitzhardinge vs. Purcell* and Lord

⁷¹ Ibid

⁷² Hertslet, Treaties, XV, p. 795; see also Lawrence T.J., op. cit., n. 26, pp. 138 – 139.

⁷³ (1800) 3 Ch. Rob 162

⁷⁴ (1856) (Swab.)Adm. 40

⁷⁵ *Blundell vs. Catterall* (1821), 5 B & Ald. 268; *Officers of State vs. Smith* (1846), 8 Sess. Cas. 711.

⁷⁶ (1829) 1 Knapp 60

⁷⁷ Ibid. at p. 67

Advocate vs. Wemyss. In the former case, Lord Parker (then Parker J.) decided as follows,

Clearly, the bed of the sea, at any rate for some distance below low water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership...⁷⁸

Whilst in the latter case, Lord Watson expressed the views as follows: "I can see no reason to doubt that by the law of Scotland the solum underlying the waters of the ocean, whether within the narrow seas or from the coast outward to the three – mile limit, and also the minerals beneath it are vested in the Crown."⁷⁹

The above cases received support and reinforcement in the opinion provided in *Attorney General vs. Chambers* where although the specific action involved ownership of a foreshore, Alderson B. advised Lord Cranworth L. C. that, excepting evidence of any particular usage: "the Crown is clearly in such a case, according to all the authorities, entitled to ...the soil of the sea itself adjoining the coast of England."⁸⁰ Argument may be canvassed that some of the cases mentioned above had references only to the foreshore and not the three- mile TS. The fact however remains that the question of whether the foreshore was part and parcel of national territory of the adjoining nation was at that point no longer in contest, because it was already assumed in many quarters that that part of the sea was vested in the Crown and what was in contest here was whether the body of water within three miles formed part of the domain of the Crown, therefore the only probable reference must be to the three – mile TS which was then the subject of controversy.

Although Nigeria's position is discussed in paragraph V below, it may be noted in passing that the Territorial Waters Jurisdiction Act mentioned above applied by

⁷⁸ (1908) 2 Ch. 139 at p. 166

⁷⁹ (1900) L.R., AC, 48 at p. 66.

⁸⁰ (1854) 4, De G.M. & G., 206; Gibson, J., "Ownership of the Sea Bed under British Territorial Waters," vol. 6, (1978), *International Relations*, p. 474 et. Seq., 479

virtue of Section 7 thereof to the British Empire, which at that time included Nigeria.⁸¹ It applied in the case of Nigeria throughout the colonial era up to independence until it was repealed by Territorial Waters Decree, 1967. Though repealed, the new Decree as a matter of fact incorporated the most salient provisions of the 1878 Territorial Waters Jurisdiction Act.

The 1878 Territorial Waters Act, like the erroneous decision it was enacted to remedy, has been subject of intense criticisms. Salmond has argued very vehemently that the purport of the Act was to extend the criminal jurisdiction over offences committed at sea, but that the more general question as to the seaward limits of British territory would seem to remain as far from definite settlement as before.⁸² He cited the reluctance of the Privy Council in the case of *AG British Columbia vs. AG of Canada*,⁸³ (a case which the Supreme Court of Nigeria equally relied on in *Abia case*), to express any opinion as to whether the dominion of Canada includes the marginal waters thereof or not to buttress his argument. Beautiful and well argued as Salmond's discussions may appear to be, he failed to explain how the Crown could by that Act confer the power of imperium upon itself over the TS, unless it already possessed the power of dominium over it. He also failed to appreciate the fact that the issue had been overtaken by more compendious reasons and several other judicial decisions and indeed later decisions as well, including Privy Council decisions, which by hierarchy of courts is the highest, and by the principles of English law expressed in the latin maxim of *stare decisis*, its decisions on such matters overrule any other similar decisions by any other court.

In addition to the above, Salmond dwelled so much on the issue of marginal sea, which is the only area of the sea he is prepared to concede sovereignty to the coastal State. Little did he realise however, that the conceptual separation between marginal sea and TS no longer hold, because judges such as Lord Kyllachy had seen the difficulty involved in regarding for example the marginal sea as forming part of the

⁸¹ Chapter 73, vol. 11, LFN, 1958, p.399

⁸² Op. cit., n. 57

⁸³ (1914) AC, p. 153

national territory of a coastal State and the TS thereof as not. This informs his holding in *Lord Advocate vs. Clyde Navigation Trustees* that,

...Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in land? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore in tidal and navigable rivers, and in the bed of the sea within three miles of the shore.⁸⁴

Lord Kyllachy's dictum above received a boost in the case of *Rex vs. Burt* where in a decision which upholds the *ratio decidendi* of the Privy Council in *Secretary of State for India vs. Chelikani Rama Rao*,⁸⁵ the Court held on appeal, that the locus of seizure, approximately one and three quarter miles from the shore, is part of the province of New Brunswick and therefore, both as to property and jurisdiction, the province of New Brunswick includes the territory within which the offence was alleged to have been committed, and that the offence as set forth in the conviction was committed within the province of New Brunswick and within the body of a county. Baxter J. was of the opinion in that case that, it is sufficient for the disposition of the appeal to say that:

As the greater includes the less, the three – mile limit was undoubtedly treated as part of New Brunswick.the contention that the property of the Crown does not extend below low-water mark, which received much support in *R vs. Keyn* has been set at rest so far as we are concerned by the judgment of the Judicial Committee in *Secretary of State for India vs. Chelikani Rama Rao* in which it is pointed out that *R vs. Keyn*, "has reference on its merits solely to the point of admiralty jurisdiction."⁸⁶

Another argument put forward as to why the three-mile TS should not be regarded

⁸⁴ (1891) 19 R. 174; Parry and Hopkins, "Commonwealth International Law Cases," vol. 9, (1978), pp. 38 – 39.

⁸⁵ (1916) 85 LJPC 222

⁸⁶ (1932) 5 MPR 112; Commonwealth International Law Cases, vol. 10, p 283 at 285 – 286.

as forming part of the territory it adjoins, is that the TS was subject to the right of public usage and also to the right of innocent passage by foreign vessels. This argument was canvassed by Sir Phillimore in his judgment in the *R vs. Keyn*. He stated:

According to the modern international law, it is certainly a right incident to each state to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas. In the former case there is no *jus transitus*; in the latter case there is.⁸⁷

The aspect of the statement above and the criticisms that can be made on it are fully considered in chapter four. It is however pertinent to note that, there is a preponderance of opinions in favour of the three-mile TS forming part and parcel of the territory of a coastal state. Towards the close of the 19th Century for example, States that initially opposed the jurisdiction of Great Britain over its four seas eventually found themselves adopting it. Thus Lawrence concludes that:

A state's territory includes the sea within a three-mile limit of its shores. Along a stretch of open coast-line the dominion of the territorial power extends seawards to a distance of three- miles, measured from low -water mark. ... Opposing views gradually died out...⁸⁸

The above therefore provide overwhelming evidence in support of coastal State's power of dominium and imperium over the adjacent TS.

2.3 Commentary

As can be seen from the theories and cases examined, whilst some of them argued in favour of power of imperium others argued in favour of power of dominium. A few of them argued that a coastal State possesses both attributes simultaneously

⁸⁷ *Supra*, at p. 83.

⁸⁸ Lawrence, T.J., *op. cit.* p.138 (emphasis added)

over the TS. The question is: Can a State exercise both powers simultaneously or it is only one of them that it can exercise at a time? Evidence abounds to support the view that the conceptual separation between dominium and imperium which can be traced to Grotius no longer holds sway. This is because it has been universally conceded that imperium over foreign ships existed only where dominium was possessed.⁸⁹ It follows therefore that, a state that possesses the two attributes over the three – mile TS can be said to possess sovereignty over it. The critics of the nature of the TS have grossly misconstrued the word, ‘sovereignty’, that a clarification of its actual meaning becomes necessary. Judge Huber in the arbitral award in *Island of Palmas*⁹⁰ case exhaustively did this when he stated *inter alia* that: “Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state...”⁹⁰

In line with Judge Huber’s definition of sovereignty above, Article 2 of the Geneva Convention on Territorial Sea, 1958 and Article 2 (1) of UNCLOS, 1982 have provided the coastal State with the legal basis required to exercise the functions of a State over its TS. Article 2 of UNCLOS for instance declared that it is the same sovereignty which a coastal State possesses over its land territory that extends to its TS.

3. United States practice

3.1 Executive and legislative measures

In the case of the US, the two incidents mentioned in paragraph IV, sub paragraph 3.1 of page 26 and 27 above clearly indicate the executive measures taken with regards to the juridical nature of the TS. Further evidence may be found in the definition of the word ‘territory’ offered by the American Law Institute, which indicates that the territory of a State consists of:

- (a) the land areas

⁸⁹O’Connell, op. cit., note 51, p. 304

⁹⁰(1928) PCA, p. 829 at 838 – 9

- (b) the internal waters and their beds
- (c) the territorial sea and its bed, and
- (d) the subsoil under, and the airspace above the territorial sea.⁹¹

Apart from these, the Department of State in a background paper prepared by it prior to the 1958 Conference on the Law of the Sea, which while referring to sovereignty and TS it stated that, “it is almost universally accepted that the coastal State possesses sovereignty or exclusive and absolute territorial jurisdiction, in its territorial sea.”⁹² Furthermore, when the United States enforced its prohibition laws on the British and other foreign vessels, the British Government did not frown at the application of the prohibition measures as according to the Secretary of State for Foreign Affairs, the United States had not violated international law since (1) foreign ships trading with a country must comply with its laws, and (2) every State is supreme over all persons and property within its dominions, including ships within its territorial waters. Furthermore, the territory of the United States as designated by the Eighteenth Amendment to the Constitution of January 16, 1920 is held to include the established three-mile limit.⁹³

3.2 Judicial practice

The US Supreme Court ruled in 1842 in *Martin vs. Waddell* that the original states acquired title to the submerged lands beneath navigable waters at independence⁹⁴ and in 1845 in *Pollard vs. Hagan* that subsequently admitted states enjoyed the same right under the equal footing doctrine.⁹⁵ The *Cunard vs. Mellon* referred to above also affirms that the territory of the United States includes the established three-mile limit.⁹⁶ All these cases demonstrate that the US treats the juridical nature

⁹¹ The American Law Institute, “Restatement of the Law, The Foreign Relations Law of the United States”, *Jurisdiction*, pt. 1, Philadelphia, (1962 draft), p. 37

⁹² Whiteman M.M., ed. *Digest of International Law*, 837 (Department of State Publication 7825), US Government Printing, Washington D.C. (1965), p. 2.

⁹³ *Cunard vs. Mellon*, 262 U.S. 100 (1923)

⁹⁴ 41 US (16 Pet) 367 (1842)

⁹⁵ 44 US (3 How.) 212 (1845)

⁹⁶ *Supra*. See also *United States vs. Smiley*, 27 Fed. Cas, p. 1132; *Louisiana vs. Mississippi*, 202 U.S. 1, 52.

of its TS as that of dominium and imperium.

4. India measures

In India too, the Privy Council seems to have finally laid the controversies generated by the *Franconia* decision to rest in the *Secretary of State for India vs. Chelikani Rama Rao*. This case concerns a dispute between the Crown and the Zemindars over the ownership of islands which had arisen in the midst of the sea within three miles of the mainland of the province of Madras in India. The case was earlier tried by a District Court which found that the title to the islands in question originally vested in the Crown. In arriving at this decision, the District Court relied on the rule of English Law as enunciated in 'Law of Waters,' which is to the effect that islands arising out of the sea belong *prima facie* to the Crown.⁹⁷ It equally placed reliance on the case of *Secretary of State for India v. Kadirikutty*⁹⁸, which makes the above mentioned rule to be applicable in India. This decision was however reversed on appeal to the High Court. On further appeal to the Privy Council, that court dismissed the decision of the High Court and upholds that of the District Court. Lord Shaw, while delivering the judgment of the court in that case, referred to *R vs. Keyn*⁹⁹ and stated that the doubts raised upon the proposition that islands rising in the sea within 3 miles from the coast of India belonged in property to the Crown were substantially rested on certain dicta pronounced in that case; he then proceeded:

... It should not be forgotten that that case had reference on its merit solely to the points as to limit of admiralty jurisdiction; nothing else fell to be there decided... When however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubts just mentioned have not been supported, nor has the suggestion appeared to be helpful or

⁹⁷ Coulson, H.J. and Forbes, U.A., *Law Relating to Waters, Sea, Tidal and Inland and Land Drainage* (6th edition), S. R. Hobday, London, (1952), p. 31

⁹⁸ (1876) 2, Ex. D. p. 63

⁹⁹ *Supra*

sound.¹⁰⁰

5. Australian measures

Webb C. J. in the Australian case of *D vs. Commissioner of Taxes* noted that the question whether or not the territory of Queensland includes the strip of water within a marine league of low-water mark, “ It seems to me, however, that since the decision of the Privy Council in *Secretary of State for India vs. Chelikani Rama Rao*, it is not open to us to answer this question in the negative, no matter what private views we may entertain as to the strength and effect of the judgment in *R. vs. Keyn* ”¹⁰¹

Thus, as in the case of the English practice examined above, the practices of the United States, Australia and Indian have again proved conclusively that the rights of a coastal State over its TS is that of sovereignty.

6. General Commentary: State of the law

The decision in *R vs. Keyn* has been so much criticised and protested against in the strongest terms possible right from the moment it was handed down that, one finds it difficult to fathom why the Supreme Court in Nigeria in the year 2002 – over a century after the decision and in the face of such overwhelming criticisms and judicial decisions to the contrary still finds it convenient to rely on it to decide such a sensitive matter as that. No wonder the decision attracted so many criticisms and debates as did the *R vs. Keyn* case upon which the decision has been based. Many people have even described it as a mere political decision calculated to exploit the FCU of the benefits of the natural resources of the adjacent ocean space rather than a legal one.

Had the Supreme Court taken the time to consider the overwhelming judicial opinions, statutory provisions and the opinions of publicists, which have since

¹⁰⁰ (1916) 43 Ind. App. 199; 85 LJPC 222; (1916) 32, T.L.R. p. 652

¹⁰¹ (1941) St. Qd. 218; Parry and Hopkins, op. cit., p. 38

rendered the correctness of *R vs. Keyn* decision doubtful, the court would probably have arrived at decisions which would be in line with such cases as *Reg. vs. Dudley and Stephens* where Lord Coleridge C. J. (who was one of the minority judges in the *R vs. Keyn* case), stated that opinion of the minority in that case had been since not only enacted but declared by Parliament to have been always the law¹⁰² or the case of *Carr vs. Francis Times and Company*, where Earl of Halsbury L. C. referring to that judgment of the majority in the *R vs. Keyn* case, stated:

“speaking of it as an authoritative judgment I cannot forbear from saying that, some what unusually, the legislature of this country in the very next session but one passed an act of parliament (41 and 42 Vic. C. 73) reversing that judgment – that is to say, affirming in the strongest terms that the decision which had been arrived at by the majority (a very narrow majority) in that case was one that was not the law of England ...”¹⁰³

To come closer home, the Supreme Court in the case under review cited the case of *AG Southern Nigeria vs. John Holt*, and yet was not persuaded by the statement of the court to the effect that:

“... if the erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had *de facto* been transferred to the Crown as ‘owners of the sea and its bed within territorial limits’, and of ‘foreshore’ ...”¹⁰⁴

Obviously, the ‘territorial limit’ being referred to by the Privy Council in that case is not the low-water mark but the three- mile territorial limit which Britain, the then colonial overlord of Nigeria claimed as its territorial limit. This is so because as at 1915 when the case was decided, the idea of the 3-mile TS limit had gained so wide recognition and as noted earlier it was adopted by many countries including the major maritime powers, though it could not be said to have been unanimously adopted by all nations as there were other nations that claimed varying distances, which in some cases are in excess of three-mile. However, the fact that other

¹⁰² (1884) 14 QBD 273 at 281

¹⁰³ (1902) AC 176 at p. 181

¹⁰⁴ Supra, at p. 611

nations claimed varying distances and not adopting low-water mark as their territorial limit is enough to show that the “territorial limit” the Privy Council was referring to in that judgment is the three-mile TS limit.

The pertinent question that a rational mind would ask in the circumstances is whether the English practice as espoused above extended to her overseas colonies as well and by extension to Nigeria or were restricted within the domain of the United Kingdom. The answer to this question is yes, the practice was introduced to the colonies, protectorates and other overseas possessions of England. Beginning from the Arabian countries, such as Abu Dhabi, Qatar, Saudi Arabia (etc), one begins to see the introduction of the practice of regarding the three mile TS as forming part of the territory of the adjoining State. In the case of Abu Dhabi – a former British protectorate for instance, the fact of TS forming part of that country could be elicited from the decision of the Arbitrators in *Petroleum Development Ltd vs. Sheikh of Abu Dhabi*.¹⁰⁵ The Arbitrators in that case decided that the TS is included in the concessions granted to the Petroleum Development Ltd based on the findings that TS forms part of the territory of Abu Dhabi. It is stated in that case that...Every State is owner and sovereign in respect of its territorial waters, their seabed and subsoil...¹⁰⁶ Similar holdings were made by the Arbitrators in the case between *Petroleum Development (Qatar) Ltd vs. Ruler of Qatar*.¹⁰⁷ Further evidence may also be found in the Australian and United States cases mentioned above.

Furthermore, let us see the status and development of the law in the context of Nigeria’s problems. In this context, there is the need to determine whether Britain introduced the three-mile TS concept to Nigeria. There is also the need to determine whether the three-mile TS was within the territories of the colonies and protectorates or not. To do this requires an in-depth examination of the traditional practices of the various Empires and Kingdoms that were amalgamated in 1914 to

¹⁰⁵ (1951)18 ILR, 144

¹⁰⁶ Ibid, at p.151 – 2

¹⁰⁷ Ibid, p. 161

form the Nigerian state regarding the nature of the TS before the advent of colonialism. After that, it will be necessary to examine the nature of the Nigerian TS during the colonial era in the context of the colonial practices, orders, proclamations, ordinances and judicial decisions. It is also necessary to consider the nature of Nigeria TS after independence in order to determine whether or not there is a carry over of the practice introduced by Britain beyond the colonial era.

Also, attention will be focused on examining the legal effects of the various cessions made to the British Government prior to colonization especially, those concerned with the maritime areas. That is, it will be seen whether the nature of practice of the local tribe's men regarding the sea bordering their towns and villages provides us with a clue to the correct determination of the nature of Nigerian TS. Subsequently, whether by such cessions the FCU, which are presently contesting the title to the maritime territory and resources with the Federal Government, are still justified to do so in-view of the aforementioned cessions.

VII. Nature of TS of Nigeria

1 General comment

The nature of the Nigerian TS will be examined in this segment in the context of the pre-colonial, colonial and post-colonial practices.

2 The Pre-Colonial Era

It should be noted from the outset that the controversy over the nature of Nigerian territorial waters began soon after independence, prior to that period there was no controversy as to the nature of authority exercised by the various kingdoms and empires that were later colonised and from amalgamation up to the time of federation no such controversy among the regions. Before the advent of colonial rule in Nigeria, there existed at various times various entities known as Emirates in the northern part of Nigeria, Kingdoms and Empires in the southern Nigeria with each of them composed of different ethnic groups. Each Emirate, Kingdom and Empire was independent of the other with a concomitant mode of government peculiar to it. History reveals for example, that Lagos was composed of ethnic

groups such as the Aworis, the Eguns etc. while Niger Delta was made up of groups such as, Kalabaris, the Effiks, Ibibios, the Urhobos, Ijaws and the Itshekiris to mention just a few. Some of these communities border the sea and they at various times asserted exclusive rights over the narrow waters. They regarded themselves as possessing some elements of rights in the form of ownership and sovereignty over the waters of the sea contiguous to their various domains, a claim which still persists to this day.

The claim to ownership of the maritime territory contiguous to these kingdoms and empires was recently re-asserted in an affidavit, deposed to by the King of Lagos in the *Abia case* that;

From time immemorial, the indigenous people of the clans, villages, communities, towns, cities or local governments in Lagos contiguous or appurtenant to or abutting the off-shore waters, have claimed and exercised sovereign rights and dominium over, and made extensive use of the off-shore waters for the purpose of exercising rights of coastal frontage owner, fishing, navigation, transport and dredging for sand, domestic activities, war and ports.¹⁰⁸

In 16th and 17th Centuries, it was already agreed that coastal States enjoyed “some rights to regulate in their own interests activities in the seas adjoining their coasts.”¹⁰⁹ It is doubtful, however if the various Kingdoms and Empires that today make up the FCU in Nigeria were aware of the existence of such rights and even if they did, their capacity to make such a claim might be suspect. At that time the various Kingdoms and Empires could not be said to be fully sovereign states recognized by international law. Though they were not yet full-fledge nations in the nature of today’s state, they were independent in their own rights, because they were not the subjects of any other sovereign and by the fact also that they were

¹⁰⁸ Supra, at 723

¹⁰⁹ Churchill and Lowe, op cit. n. 28 at p.71

composed of their own territories, government and population. Like other coastal States and territories, the Kingdoms and the Empires derived the title and ownership they asserted first and foremost by their contiguity to the sea shore. Coupled with their native laws and customs this enabled them to exercise and regulate activities on the seas adjoining their coasts. An evidence of formal recognition by Britain of the title and ownership of the Kingdoms and Empires could be seen in a Declaration between the British and Kosoko, dated the 7th of February, 1863.¹¹⁰

2.1 Nature of the rights exercised before colonisation

The rights exercised by the kingdoms and empires over the adjacent sea areas were manifested in the periods before colonisation in the form of:

- (a) Granting of fishing rights to both the king's subjects and his vassals;
- (b) Levying or waiving the right to levy port duties on both foreign and ships of vassals;
- (c) Transportation of both human and materials, such as logs of wood between the various parts of the kingdoms and empires;
- (d) Waging of wars with enemy kingdoms.
- (e) Granting of right to dredge for sand to both the loyal subjects or to vassals;
- (f) Trading within the various groups and also with other foreign nations, particularly the Europeans who came in search of slaves, Palm oil, Kernel, Gum Arabic, Rubber and other articles of trade. This resulted in the conclusion of various trade agreements for example between the British and the local rulers of the kingdoms and empires.¹¹¹
- (g) Through the execution of various treaties of cession and trade agreements with the European powers.

Thus, even though the Kingdoms and Empires were not then States as noted above, their international legal personality and capacity to conclude international treaties

¹¹⁰ See BFSP (1866 – 1867) vol. LVII, p. 354

¹¹¹ See Agreement between King and Chiefs of Lagos and Britain of the 28 of February, 1852, in BSFP (1852 – 1853), Vol. 42, p. 693.

and engaged in international trade was evident by the various treaties they concluded with Britain and other European countries prior to colonisation. The fact that they were sovereign in their own rights was also evident in the administrative and traditional functions which they exercised over their land and maritime territories.

2.2 The extent of the sea areas controlled prior to colonisation

The question which follows from above has to do with the extent or breadth of the sea the various Kingdoms and Empires exercised these acts of dominium and imperium. The extent of the sea areas claimed by the various Kingdoms and Empires is not specified either in the affidavit by the King of Lagos referred to above or in any written or oral documents. Similarly, the breadth of sea areas upon which the Kingdoms and Empires exercised the acts of dominium and imperium are not specified in the various treaties and agreements they entered into with the British prior to colonization. The idea of the three-mile TS, which at that time occupied the jurisprudence of international law of the sea, might not also be known by the various Empires and Kingdoms. An important fact is that the Kingdoms and Empires charged and received customs duties from European traders who made use of their TS. On many occasions the Kingdoms and Empires had arrested European traders who flouted their customs laws. This is evident from the trade Agreement concluded between Britain and the King of Lagos on the 28th of February, 1852, whereby the King and Chiefs of Lagos made an undertaken in Article I not to detain any trader on shore. Article VI of the same Agreement obliges the traders to pay respect to the King of Lagos.¹¹²

In the periods between 16th and 18th Centuries, the extent of the dominium and sovereignty the various Kingdoms and Empires claimed to have possessed and exercised could only be possibly explained in terms of the three miles TS. This was the only valid distance that the great maritime nations were prepared to recognize at that time. Any claim in excess of three miles would certainly not be supported or

¹¹² Ibid

recognized by Britain, which was in the forefront among the early Europeans to have established trading contacts with the Kingdoms and Empires.

2.3 Traditional forms and extent of control

In the case of the present day Niger Delta, evidence abounds that, the Efiks and Efiats of old Calabar controlled and exercised acts of ownership over sea areas extending to the present day Bakassi to the south, across the Cross River estuary to Tom Shot Island to the west and inland to the present day Odukpani and Akampa local Government Areas to the North and west. By the middle of the 19th Century, the British and the German missionaries and traders had started to establish trading centers along the coast. In exercise of the supposed authority and ownership of the maritime territory adjacent to Calabar Kingdom, King Ephraim IV is recorded to have refused on many occasions to grant permission to the Europeans to settle on the coast or penetrate the hinterland, because he had already established flourishing markets in various areas of the Cross River Basin.¹¹³ This led for example to the conclusion of the agreement to regulate trade between the British supercargoes and the native traders of old Calabar, signed on the 19th September 1856.¹¹⁴

There is also the cession of maritime areas by the Kings; one notable example was the cession of Lemain Island via a Treaty signed on 14th April 1823, in favour of the British Government.¹¹⁵ The treaties, including those with Dosunmu of Lagos and those with the Kings of old Calabar are assumed in many quarters to have been concluded based on the recognition by Britain and other powers of the control and the rights possessed by those Kings over the sea on which they traded and interacted. It may be rightly argued that there is justification in the claims of the various Kingdoms and Empires to the dominium and exclusive ownership of the maritime territory contiguous to their various domains.

¹¹³ See Nigeria's Counter-Memorial in the case Concerning Land and Maritime Boundaries between Cameroun and Nigeria, Vol. I, chapters I – II, P.60

¹¹⁴ Ibid, p.72

¹¹⁵ Ibid, p.71

3 The Colonial Era

3.1 Preliminary remarks

The colonial era began in Nigeria with the signing of the treaty of cession, dated the 6th of August 1861, made between King Docemo (Dosunmu) of Lagos and his chiefs with the British Government, whereby, the port and Island of Lagos were ceded to the British Government.¹¹⁶ A salient part of the treaty provides that:

They grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full and absolute dominium and sovereignty of the said port, island and premises, with all the royalties thereof, freely, fully entirely and absolutely.¹¹⁷

This treaty is also well discussed in the case of *AG of Southern Nigeria and others vs. John Holt*.¹¹⁸

Thereafter, other cessions were made in favour of the British Government. For example, in a Declaration dated February 7, 1863, Kosoko, a former king of Lagos relinquished his former territory, the ownership of which according to him was recognised as such by the British Government. An aspect of the Declaration states that: "Having now left Epe, and returned to Lagos by the kind permission of Her Britannic Majestic Government, I lay no further claim to the ports of Palma and Leckie (Lekki), which consequently must revert to the Lagos Government."¹¹⁹

On July 7, 1863, another Agreement was concluded between the Chiefs of Badagry and the British Government. Article I states in part that the Chiefs of Badagry have freely and willingly ceded to Her Majesty the Queen of Great Britain, her heirs and successors, for ever, the town of Badagry, and all the rights and territories and appurtenances whatsoever thereunto belonging, as well as all profits and revenues,

¹¹⁶ BFSP (1861 – 1862) Vol. LII, P. 181-182

¹¹⁷ Ibid

¹¹⁸ Supra, p. 609

¹¹⁹ BFSP (1866 – 1867) vol. LVII p. 354 (emphasis added)

absolute dominion and sovereignty of the said town and territory of Badagry, freely, fully, entirely and absolutely.¹²⁰ Badagry is located by the Atlantic Ocean and presently a Local Government Area in Lagos state. The inclusion in the Agreement of all territories and appurtenances in the areas ceded, necessarily included the TS adjoining Badagry.

The implication of the various cessions above is that, they confirm the international legal personality and the capacity of the Kings to enter into treaty relation. They also serve as recognition of the dominium and sovereignty of the Kingdoms and Empires by Britain and other States that had entered into treaty relation with them. The other implication is that Lagos became a British Crown possession in 1861 and Badagry in 1863.¹²¹ The question that may be asked at this point is: What happened to the other Kingdoms and Empires that were not directly ceded to the British?

The successful annexation of Lagos as a Crown possession in 1861, served as impetus for similar annexations of the other Kingdoms and Empires along the coast. However, while the annexation of Lagos was achieved through the various cessions (amidst major protests in most cases) referred to; the annexation of the other Kingdoms and Empires along the coast was achieved by military might. Various military expeditions were carried out against the Kingdoms and Empires and because majority of them were already embroiled in internal rivalry and conflicts they fell very easily to the British military might. The conquest was usually followed by the signing of a treaty of protection. Thus, the Oil River Protectorate was constituted on June 5, 1885, after successful military expeditions against the territories between the protectorate of Lagos and the western bank of the Rio del Rey.¹²² The Benin Kingdom for example was annexed after the expedition of

¹²⁰ Ibid, pp.358 - 359

¹²¹ Tamuno, T N., "British Colonial Administration in the Twentieth Century," in Obaro Ikime (ed) *Groundwork of Nigerian History*, Heinemann, Ibadan, (1980)

¹²² Hertslet, vol. 1, p. 123; Brownlie, I., *African Boundaries: A Legal and Diplomatic Encyclopaedia* London and Worcester, (1979), p. 553

1897.¹²³ In 1906, through Order in Council of February 16, 1906 the Protectorate of Southern Nigeria was constituted, following the merging of the Lagos Colony with the Western Provinces and the Niger River (formerly Oil River) Protectorates.¹²⁴ By these methods, the entire southern Nigeria was brought under the British rule. The protectorate of northern Nigeria was similarly established through Order in Council of December 27, 1899 and included all areas formerly under the control of the Royal Niger Company.¹²⁵

3.2 The administration of the territories by Britain

On the 1st of January 1914, both the Northern and Southern (then composed of Lagos colony) protectorates were amalgamated to form the entity, which is now commonly called the Federal Republic of Nigeria. Thereafter, English laws and practice in the form of express enactments were introduced to Nigeria. First, the laws were introduced by way of Orders in Council, acting by virtue of prerogative, or powers conferred by the British Settlement Act, 1887. Secondly, English law was introduced through the Foreign Jurisdiction Act, 1890, which applied to protectorates, protected states and trust territories. Thirdly by colonial legislation - through Ordinances, Acts, Proclamations by virtue of the powers granted to such legislature by the Crown.¹²⁶

As far as Nigeria is concerned, the authority for the application of English laws is to be found in the Supreme Court Ordinance of Nigeria, 1914. In the Lagos colony, Ordinance 3 of 1863 made English laws applicable so far as local circumstances permitted, unless inconsistent with any Order in force in that colony. Similarly, the common law principles of equity and statutes of general application became directly applicable in Nigeria.¹²⁷ The importance of the application of English law in

¹²³ Ikime, O., *Niger Delta River: Itsekiri – Urhobo relations and the European Presence, 1884 – 1936*, London (1969), p.187

¹²⁴ Supra, note 103

¹²⁵ Brownlie, I., op. Cit., n. 112, p. 165

¹²⁶ Allott, A.N., *Essays in African Law: with special reference to the Law of Ghana*, London (1960), p.4

¹²⁷ Ibid, p.3; See also, Obilade, A. O., *Nigerian Legal System*, Sweet & Maxwell, London, (1979), p. 69 and Park, E.A.W., *The Sources of Nigerian Law* African University Press, London (1963)

Nigeria is that, it provides us with the yardstick for examining what the nature of the TS bordering the southern extremity of Nigeria was during this period. It makes it possible for us to consider the nature of the Nigerian TS in the context of the various enactments cited and also in the context of the prevailing practice in England and in other British colonies.

3.3 Question of three-mile TS and how it came to form part of Nigerian territory.

It is necessary to consider the legislation relating to the boundaries of Nigeria. Two major sources are noteworthy in this respect. The first is through treaties and the second by domestic legislation.

3.3.1 Treaties

Among the earliest colonial arrangements regarding boundary in Nigeria, two are of crucial importance.

(i) The first is the Agreement between Britain and Germany regarding the Rio del Rey of 14th April, 1893. Article II of that Agreement fixed the Calabar sector of Nigeria boundary in 'the sea'. It provides, "from this upper end of Rio del Rey to the sea, that is to say, to the promontory marked West Huk on the above mentioned chart, the right of the Rio del Rey water way shall be the boundary between the Oil River Protectorate and the colony of the Cameroun's."¹²⁸ This does not provide a clear indication regarding the outer limit or extent of the coastal areas of Nigeria.

(ii) The second is the Anglo – German Treaty of 11th March, 1913. A portion of it describes the boundaries of Southern Nigeria thus;

from the centre of the navigable channel on a line joining Bakassi point and King Point, the boundary shall follow the centre of the navigable channel of the Akwayafe River as far as the 3 – mile limit of territorial jurisdiction... the 3 – mile limit shall, regards the mouth of the estuary, be taken as a line 3

¹²⁸ Treaty Annex NC –M 27 of 14th April, 1893, No. 273, P. 147

nautical miles seaward of a line joining the Sandy Point and Tom Shot Point.¹²⁹ This has clarity in terms of dimension.

The boundary description contained in the Anglo – German Treaty followed the colonies and protectorates of Nigeria into amalgamation in 1914 and even beyond to the adoption of a federal system of government in 1951 through the Macpherson Constitution of that year. Further analysis of this treaty follows shortly.

3.3.2 Domestic legislation

The domestic legislation regarding the southern boundary of Nigeria was made as Orders in Council. About six of them are relevant.

(i) Thus in 1899, a description of the boundary of the entire southern Nigeria was made by an Order in Council. The description of the boundary as given in that Order is the sea.¹³⁰

(ii) Furthermore, in 1911, another Order in Council described the southern boundary of Nigeria as the territories of Africa which are bounded on the south by the Atlantic Ocean, on the west by the line of the frontier between British and French territories, on the north and north – east by the British protectorate of Northern Nigeria, on the east by the frontier between British and German territories.¹³¹

(iii) Worthy of mention is the Colony of Nigeria Boundaries Order-in-Council of 1913; it defines the boundary of the southern extremity of Nigeria as the shore of the Bight of Benin.¹³²

(iv) Another legislation is the Order in Council providing for the administration of

¹²⁹ Agreement between Great Britain and Germany respecting the settlement of Frontier between Nigeria and Cameroons from Yola to the Sea, Treaty Annex NC – M 45 of 11th March, 1913, p. 238 – 239.

¹³⁰ The Southern Nigeria Order in Council of 27th December 1889, p.201

¹³¹ Southern Nigeria Protectorate Order in Council, of 4th February 1911, p.112.

¹³² LFN, (1958) vol. II, P.218

the Nigeria protectorate and Cameroon's under British mandate; this Order in Council like the previous ones above described the boundary of the protectorate of Nigeria under article 4(1) as the Atlantic Ocean.¹³³

(v) In 1953, a separate Order was made for the delimitation of Lagos Township; this is contained in the Lagos Local Government (Delimitation of Town) Order in Council. The schedule to this Order gives the southern boundary of Lagos as the "sea."¹³⁴

(vi) Pursuant to section 5, subsection 2 (a) of the Nigerian (Constitution) Order in Council, 1951, the then Governor General of Nigeria, acting in his discretion was allowed by proclamation, with the approval of the British Secretary of State, to define and from time to time vary the boundaries of any region of Nigeria. Upon this Order, the Governor General made a proclamation – the Northern Region, Western Region and Eastern Region (Definition of Boundaries) Proclamation, 1954. That Proclamation was published as Legal Notice No. 126 of 1954. The Order contains three schedules, the second defines the boundary of the Western Region and the third defines the boundary of the Eastern region, both give the southern boundary of each region as the "sea."¹³⁵

Based on the treaties and Orders in Council, there is confusion regarding the extent of the TS of Nigeria. This is making it difficult to ascertain the extent of the said TS. This is because only the Anglo-German Treaty of 11th March, 1913 described the southern boundary in relation to the three-mile TS, the rest simply give the southern boundary of Nigeria as the sea. What is the sea? Where does the sea start? Could it be that the Anglo-German Treaty, which is an international treaty, defines the maritime territory of Nigeria, while the Orders-in-Council, which are domestic laws, define the land territory of Nigeria? The Supreme Court of Nigeria, in the *Abia case* defined the word, 'sea' by reference to

¹³³ The Nigeria (Protectorate and Cameroons) Order in Council of 2nd August 1946, p. 573.

¹³⁴ Western Region Order in Council, No.7, Chapter 93, LFN and Lagos, 1958

¹³⁵ LFN and Lagos, 1958, pp. 686 – 687, (the schedules not included in the pages)

the Concise Oxford Dictionary. According to the Court, the Oxford Dictionary defines 'sea' as meaning,

An expanse of salt water that covers most of earth's surface and encloses its continents and islands, the ocean, any part of this as opposed to dry land or fresh water, that it follows that the dry land or fresh water abutting the sea is not part of it.¹³⁶

Based on this and the authority of *R. vs. Keyn*, which according to the court states that, at common law the seaward boundary of a state is the 'low-water mark and concludes that the boundary of the FCU in Nigeria is the low-water mark along the coast.'¹³⁷ The immediate implication of the imprecise nature of the various boundary Orders, the *R vs. Keyn case* and the reliance on the case by the Supreme Court of Nigeria in its judgment in *Abia case* is that, it again brought to the fore the question of the juridical nature and extent of the TS thought to have been long resolved.

In arriving at this judgment, the Court literally placed reliance on the provisions of Article 3 of the Geneva Convention on the Territorial Sea and the provisions of Article 5 of the UNCLOS with regards to normal and straight baselines measurement. In the Court's view, since the low-water mark is the normal base line recommended by the two Conventions as the starting point for measuring the breadth of the TS and by extension other maritime zones, it therefore follows that the low-water mark must be the boundary or the limit of the land territory as opposed to the maritime territory of the FCU.¹³⁸

The reasoning of the Court in that case cannot be supported either by the *ratio decidendi* of the judgment or by any sound legal reasoning. In the first place, let us look at the meaning of the word 'sea'. The meaning ascribed to the word 'sea' by

¹³⁶ Op. cit., p. 728

¹³⁷ Ibid.

¹³⁸ Articles 5 and 7 of 1982 UNCLOS

the Court is contrary to the meaning ascribed to it by the Oxford Dictionary quoted and relied upon by it, because land exposed by shifting tides is also part of the land territory and not the sea. It is also contrary to the legal meaning of the word 'sea', contained in both Stroud's Judicial Dictionary and the Dictionary of English Law by Earl Jowitt. For instance, Stroud's Judicial Dictionary defines the sea as: The Sea is either that which lies within the body of a COUNTY, or without. "The part of the sea which lies not within the body of a county is called the main sea, or ocean."¹³⁹ The Nigerian Court is thus wrong by this Stroud's definition. Similarly, sea is defined by Jowitt as follows:

The main or high seas are part of the realm of England, for thereon the courts of Admiralty have jurisdiction, but they are not subject to the common law. The main sea begins at the low-water mark, but between the high-water mark and the low-water mark, where the sea ebbs and flows the common law and Admiralty have divisum imperium, an alternate jurisdiction, the one upon the water when it is full sea, the other upon the land when it is an ebb.¹⁴⁰

Taking together, it follows that, if the waters within the body of a county are also part of the sea, then the low-water mark cannot be the final limit of a State. It follows also that if the low-water mark was not the limit of England at the time in question, the sea mentioned in the various Boundary Orders which described the southern boundary of Nigeria can definitely not be the low-water mark. The definition of the Supreme Court of Nigeria is equally contrary to the Anglo – German Treaty of 11th March, 1913 and the case of *AG Southern Nigeria and another vs. John Holt*, which both describe the southern boundary of Nigeria in relation to the three-mile TS. The word 'sea' as used by the various Boundary Orders appears to be more compatible with any part of the three miles TS mentioned in the 1913 Anglo – German Treaty and in the *AG Southern Nigeria and another vs. John Holt* than it is to the low-water mark, which the court ascribes to the word. It is also more compatible with the observation of Ohaegbu than it is to

¹³⁹ James, J.S., *Stroud's Judicial Dictionary*, vol. 5, London, (1974), p.2454

¹⁴⁰ Jowitt, E. and Walsh C., *The Dictionary of English Law*, vol. 2, (I – Z), Sweet and Maxwell, London, (1959), p.1596

the low-water mark. Thus Ohaegbu observes as follows: “And because the word “sea” was nowhere defined in the Act, it was open to construe it as the limit of the territorial waters, which then extended to three nautical miles seawards from the low-water mark”.¹⁴¹

Furthermore, the court seemed to have lost sight of the meaning of the low-water mark as used in the conventions and had completely failed to address its mind to the developments before and after the decision in the *R vs. Keyn*. The description of the southern boundary of Nigeria in relation to the three mile TS accords with the practice of Britain and other maritime nations, which adopted the three mile as their territorial limits to replace the rather indeterminate cannon shot rule introduced by Galiani and which was dictated by the maxim, *terrae dominium finitur ubi finitur armorum vis*.

The word ‘sea’ certainly encompasses the sea- bed of the TS, and even the high seas or any part thereof. It is therefore, erroneous for the court to have concluded on that basis alone, that ‘the sea’ means low-water mark. The word ‘sea’ as defined by that dictionary may mean any part of the sea from low-water mark seaward even to the high seas, but certainly it cannot be the low-water mark as adjudged by the court because the low-watermark is nothing more than a line along the coast which forms the basis for the measurement of other maritime zones. It is the lowest astronomical tide, which when it is high tide is covered by the waters of the sea but uncovered at low water tide. Thus the word sea cannot have the meaning ascribed to it by the Supreme Court of Nigeria and the low-water mark, which is nothing more than land covered regularly by sea at high tide and left open at low tide cannot be the limit of Nigeria’s maritime territory. It will be shown in chapter four that the *R vs Keyn*,¹⁴² case which the Nigerian Supreme Court relied on in its judgment had long been overtaken by events that happened before and after the decision. It may be that the Anglo-German treaty being an international treaty defines the international

¹⁴¹ Ohaegbu, G., *The Breadth of Territorial Waters in the State Practice of some African Countries*, Bonn (1975), p. 173

¹⁴² Supra

boundary of Nigeria, while the Orders-in-Council being domestic laws define the land boundaries of Nigeria. It follows also that the breadth of Nigerian TS during the period under review can only be logically explained in terms of the three-miles mentioned in the Anglo-German Agreement and in the case of *AG Southern Nigeria vs. John Holt*.

3.3.3 Evidence from Colonial Officers in the context of legislation

It will be useful to scrutinize the views held by colonial officers and other officials regarding the nature and extent of the TS of the former British colonies. In the late 1950s for example, the Colonial Office intended to extend the boundaries of some of its colonies, including the colony of Nigeria. A question was posed by the law officers as to whether the legislature of a colony or protectorate might, by virtue of its power to make laws for the peace, order and good government of the territory, enact laws governing the exploration and exploitation of the natural resources of the CS 'outside the TS.'¹⁴³ Although the question was answered in the affirmative in view of the Geneva Convention of 1958, to which Britain was then about to become a party,¹⁴⁴ the point of relevance there is the mention in that question of the word 'TS,' which presupposes that the TS was already included in the boundaries of the colonies which was being sought to include the CS thereof.

Certain colonial enactments were made to clear the doubts that were being expressed in some quarters as to the competence of the local governments to make exclusive grant of the maritime areas below the low-water mark of the coast of the colonies. Most of the enactments and the discussions leading to them unambiguously affirm the proprietorship of the Crown over the maritime areas below low-water mark extending to the three mile territorial limits of the Crown's colonies. For example, the Foreshores and Sea Bed Ordinance of 1900 is probably

¹⁴³Marston, G., "The Incorporation of Continental Shelf Rights Into United Kingdom Law," vol. 4 (1996), *ICLQ* p.13 at 27

¹⁴⁴ Britain signed the Geneva Convention on Continental Shelf, 1958 on September 9, 1959 and ratified it on the 11th May, 1964; See 499 U.N.T.S. 311

the first colonial enactment relating to the legal status of maritime territory outside the inland waters of a colony. Its enactment came as a result of an application made by a company in Singapore which was then part of the Crown Colony of Straits Settlements with respect to the grant of a lease of the maritime territory adjacent to the premises of the company. There arose a doubt as to the competence of the local government to make such grant, which was then considered to be a part of the open seas. Though the Colonial Office doubted whether the portion of the sea being referred to actually constituted an open sea, nevertheless, Wilson, a legal assistant in the Colonial Office wrote in response that, "in the absence of express legislation in the colonies I suppose the foreshore is, as elsewhere, in the Crown as well as the sea-bed within territorial limits, except in cases where it can be proved to have legally passed into the hands of private persons...there can I imagine be no objection to the Crown dealing with its property."¹⁴⁵

The enactment of the Foreshores and Sea Bed Ordinance of 1900 opened the floodgates for similar legislations in the other colonies. A similar question as in the case of Strait Settlements arose with respect to the British Guiana and T C. Rayner, the then Attorney General of the colony asked the Solicitor General also of the colony "whether the doctrine of territorial waters gave the sovereign power over the waters adjacent to his dominions similar to his power over land."¹⁴⁶ Nunan replied and pointed out that:

under Roman- Dutch law (the law of the colony at that time) the foreshore and the land below low- water mark was not the property of the Crown but was *res nullius* or *res communis*... neither the rule of international law as to territorial waters nor the English Act of 1878, giving effect to it in British territories (which *R. vs. Keyn* rendered necessary, but which case at any later

¹⁴⁵ Marston, G., "Colonial Enactments Relating to the Legal Status of Offshore Submerged Lands," vol. 50 (1976) *The Australian Law Journal* p.402 at p. 403

¹⁴⁶ Cited in despatch 310 dated 30th August 1915 from the Governor to the secretary of state for the colonies: C.O. 111/601(unfoliated); C.O. Confidential Print West Indian No. 200 9C.O.884/12) p.105; Marston, G., op. cit., n. 137, at p. 406

date would probably have been decided differently), affect the question of the ownership of the soil.¹⁴⁷

Nunan's comments cannot be supported in all their ramifications. First, his use of the words, *res nullius* and *res communis* interchangeably, as if the two mean the same thing cannot be justified. The two concepts refer to different legal concepts and cannot be used in the sense that Nunan has used them. Secondly, his reference to the case of *R vs. Keyn* to buttress his argument cannot be supported. The decision in *R vs. Keyn* case deviates from earlier and later decisions on the issue of limit of the territory of England and to that extent has been rejected by numerous authors and later decisions. In apparent disapproval of such a proposition, J. S. Risley, a colonial legal adviser commented thus:

I think there is sufficient authority for the proposition (though it has never been strictly held by the courts) that under English law the soil of the sea between low-water mark and the three mile limit (including mines and minerals thereunder) is the property of the Crown, and can be granted by the Crown subject to public rights of fishing and navigation etc. over the locus of the grant. We have acted on this proposition both in the Straits and Hong Kong.¹⁴⁸

The judicial authorities, which Risley complained of, began to trickle in as noted above from 1900 onward¹⁴⁹.

Other colonies that have made similar enactments include Gambia and Sierra Leone, though both did not directly include a clause vesting ownership on the Crown, but the interpretation section thereof provided that, the TS bed and subsoil and the CS were included in the ambit of the legislation and that the shelf was held in the right

¹⁴⁷ Ibid (emphasis added)

¹⁴⁸ Law Officer's Report of 11 Nov. 1899 and 28th March, 1900 in C.O. 111/601 (unfoliated);

¹⁴⁹ Lord Advocate vs. Wemyss (supra); Carr vs. Francis Times (supra) and Secretary of State for India vs. Chelikani Rama Rao (supra) etc.

of the colonial government.¹⁵⁰ In the case of Nigeria, attempts were made to extend the maritime boundary beyond the three – mile territorial waters limit to include the CS thereof in-order to facilitate oil exploration. Difficulties were encountered in the process because it was perceived that it would be against the spirit and intention of the Geneva Convention on the Continental Shelf 1958, which was about to become fully operational, to annex or incorporate the CS within the boundaries of Nigeria. The reason for this is that annexation of the CS would mean bringing it into the same legal status as the TS, which is obviously contrary to the provisions of article 2(1) of the convention. The article makes it clear that a coastal state only possesses sovereign rights over that zone for the purposes of exploring it and exploiting its mineral resources. A coastal state can therefore not legally annex it. In the correspondence that followed, it was made clear that annexation should be out of the question in view of article 2(1) of the Convention, but that legislation should be enacted under the power of the colonial government to make law for peace, order and good government of the territory, which would enable it to carry out exploration and at the same time exploit the resources in it.¹⁵¹

Apart from the legal issue of annexation, the proposed Order also raised a constitutional question, in view of the extra-territorial legislative incompetence of the colonies, a principle which precludes the colonies from legislating on matters outside their national boundaries. Thus, since the CS is outside the national boundaries of the colonies, they could not legally legislate on it. All the above were however taken into consideration in the text of the Order that was eventually adopted. The text of the Order was then sent in the form of a circular to all the dependent territories with a seacoast. Having stated that further ‘annexations’ by Order-in-Council must be ruled out as inconsistent with the Convention and having set out the gist of the law officers’ opinion the circular contained a paragraph redrafted by Gutteridge which provides as follows:

¹⁵⁰ Gambia: Mining (Mineral Oil) Act 1955; Sierra Leone: Mining (Mineral Oil) Ordinance 1958 and Mining (Mineral Oil) (Amendment Ordinance 1960

¹⁵¹ CO554/2109 (WAF1029/3/01)

“It is not proposed to alter or revoke existing Orders relating to continental shelves, and if asked by other States how they are reconciled with the Convention, it would be said ...that any rights now exercised under these orders, or under the Submarine Areas of the Gulf of Paria (Annexation) Order, 1942, would be the rights recognized by the convention.”¹⁵²

Although the various colonial Orders, extended the CS boundaries of the Colonies for the purpose of exploration and exploitation of the mineral resources of the seabed, the fact remains that the extension was based generally on the assumption that the TS was already within the national boundaries of the affected colonies and had been granted and leased on several occasions. This indeed corresponds with the prevailing executive opinion in the period shortly before the signing of the 1958 Conventions that the sea bed and the subsoil thereof, at least up to the seaward limit of the TS of the United Kingdom were part of the Crown Estate and under the management of the Crown Estate Commissioners established by Crown's lands legislation. The Commissioners who had the statutory duty of administering the Crown Estate considered their jurisdiction extended at least to the seaward limit of the TS and acted accordingly in making grants, leases and licenses for the purpose of construction and mineral dredging and extraction. The Commissioners' contemporary view of the extent of Crown ownership is indicated in a memorandum on the subject of foreshore and seabed, which they issued on 7 August 1958. A portion of the memorandum reads:

“Not only the foreshore (excluding foreshore under the control of the Duchies of Lancaster and Cornwall.), but also the bed of the sea below the seaward limit of the foreshore and within territorial waters, and of every channel, creek, estuary, and of every navigable river as far up as the tide flows, are vested in Her Majesty ...”¹⁵³

¹⁵² Marston G., op. cit., n. 135, at p. 27

¹⁵³ CRES58/1020 (Foreshores 25316)

The executive opinion has been argued by Geoffrey Marston not to have been derived so much from the rule of customary international law whereby coastal states possess sovereignty to this limit, but from a perception of the historical claims of ownership by the Crown in both England and Scotland¹⁵⁴. As far as this statement may be true, it must be stressed that, the rule of customary international law played a very significant role in reinforcing the historical claims. It is that rule of customary international law *inter alia* that afforded the historical claim of the Crown the legal cloak, which it seemed to have lacked initially.

4 Post-Colonial Period

4.1 General comments

Discussions on post-independence practice relating to TS will be devoted to answering the questions listed below. The questions are necessary in order to determine whether the ceded and the un-ceded territories went back to the Federal Government of Nigeria after colonization or that those who ceded them retained reversionary interests in them so that the territories went back to their former owners. The questions are:

- (a) What is the present status of the ceded territories? In other words, whether by the cessions made by the kings and chiefs, the ownership and sovereignty which they claimed to have possessed survive after independence.
- (b) Since it is only a few islands in Lagos and in Calabar that are known to have been ceded, what then happened to the other islands and the TS areas adjacent to towns and cities which were not ceded by the Kings and Chiefs?
- (c) What has been the nature of Nigerian TS since independence?

4.2 Status of the ceded territories

Before Nigeria became independent in 1960, it had already become a signatory to the Geneva Conventions of 1958 hence the provisions were applicable to it. Thus before Nigeria's independence, the Geneva Convention on the Territorial Sea and Contiguous Zone had already conferred sovereignty over the TS on coastal

¹⁵⁴ Ibid

States,¹⁵⁵ including Nigeria. Similarly, the Geneva Convention on the Continental Shelf had conferred sovereign rights and jurisdiction over the CS¹⁵⁶ on coastal States, including Nigeria, which is the only entity, recognised by international law as possessing the necessary international legal personality for the assertion of the rights mentioned by those Conventions. This presupposes that all the territories previously held by the British Government in Nigeria, which it had to relinquish as a consequence of Nigeria's independence could only revert to the latter which is the successor state to the Crown's governmental authority in Nigeria and not to the FCU. The various treaties of cession do not also contain reversionary clauses to make the interests transferred to revert to the Kingdoms and Empires. The basic rule therefore, is that, colonial territory becomes independent in its entirety.

The FCU did not possess the necessary international legal personality required to succeed to the ownership and control of the maritime territory, which the departing colonial power was relinquishing and which the convention had already vested in coastal States. The legal situation generated by the departure of the colonial powers and the eventual independence of the former colonies has been described by the Australian Court in *New South Wales vs. Commonwealth*¹⁵⁷ and *Bonser vs. La Macchia*¹⁵⁸ as having passed by virtue of the independence of Australia from Great Britain to the Commonwealth through the operation of international law principle of state succession. Thus the only competent authority that could succeed to the Crown's former cessions is the Nigerian state, which is the rightful successor to the Crown's governmental authority in Nigeria after colonisation.

4.3 The un-ceded territory

Not all parts of the coastal areas of Nigeria were ceded to the British at the inception of colonial rule. Those parts that were not ceded were forcefully brought under colonial rule through annexations and signing of treaties of protection with

¹⁵⁵ Articles 1 and 2 of the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958

¹⁵⁶ Article 2 of Geneva Convention on the Continental Shelf, 1958

¹⁵⁷ (1975) 135 CLR, 337, 366 per Berwick CJ

¹⁵⁸ (1969) 122 CLR, 177, per Berwick CJ, and pp. 223 – 224 Windeyer J.

the various Kingdoms and Empires. Thus the surrender of the Egbado Yorubas brought them under the British rule after successfully seeking its protection in 1880, the Itsekiri kingdom in 1894 and the Benin Kingdom in 1897 after the British expedition against that Kingdom, to mention just a few. Both the ceded and unceded maritime territories reverted to Nigeria under similar principle of state succession.

4.4 Problems of lack of legislation appropriating Nigeria's sovereignty over the TS

The conclusions in the preceding section are fraught with some legal problems as most of the country's laws and practices relating to the maritime zones have failed to assert the rights bestowed on the country by both the Geneva Convention and subsequently by UNCLOS. The law that went the furthest in this regard claimed only right of or actual acquisition of resources located both on land and in the sea and not sovereignty over the TS as granted by UNCLOS. Thus section 1 of the Minerals and Mining Decree (Act) of 1999 for example, provides as follows;

- (1) The entire property in and control of all minerals, in, under or upon any land in Nigeria, its contiguous continental shelf and of all rivers, streams and water courses throughout Nigeria, any area covered by territorial waters or constituency, the exclusive economic zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.
- (2) All lands in which minerals have been found in commercial quantities shall, from the commencement of this Decree, be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act and the Minister may, from time to time, with the approval of the Federal Executive Council, designate such lands as security lands.¹⁵⁹

This, of course is an unsatisfactory state of affairs. Nigeria by its laws vests the property and power of control over mineral resources on land and sea on the

¹⁵⁹ Decree No. 34 of 1999

Federation of Nigeria, but not the powers granted by UNCLOS on the TS and other zones. Furthermore, subsection (2) above talks of all lands in which mineral resources are located; it is doubtful if all lands can be interpreted to include the sea. This is true, especially as the concluding clause of that subsection talks of the Land Use Act, which applies mainly to the land territory and not to the maritime territory of Nigeria. Even by using the word “acquire” is suggestive of the Federal Government acquiring or taking over the resources from a prior owner. It is therefore doubtful if “power of control” and “acquire” as used in the Decree can be interpreted as tantamount to power of imperium over the resources or that of dominium over the TS. The questions that may be asked consequent upon the above are these:

- (1) What is the status of a maritime territory where the coastal State has claimed less than that which is allowed by international law?
 - (a) Is it therefore not available to the coastal State?
 - (b) Is it nevertheless part of the territorial sovereignty (in the case of TS and internal waters) and sovereign rights (in the case of CS in accordance with the *North Sea Continental Shelf cases*) but not the EEZ (that depends on claim of Government)?
- (2) If (b) is correct, where do those territorial sovereignty/sovereign rights reside, the Federation of Nigeria or the FCU?

With respect to question number one, it may be noted that it has been recognized that there is a general duty in international and customary laws for States to bring their internal or domestic laws into conformity with obligations under international law. However, this does not necessarily mean that failure to do this constitute any direct breach of international law.¹⁶⁰ A breach will only necessarily occur if such a State fails to observe its obligations on a specific occasion. By signing and ratifying UNCLOS, Nigeria has demonstrated that it was acceding to the provisions. It follows therefore that the omission to bring the domestic laws into conformity with the provisions of UNCLOS by claiming for example sovereignty over the TS

¹⁶⁰ Brownlie, I., *Principles of Public International Law*, (6th ed.), Oxford (2003), p.34 -35

cannot in any way deprive her of the benefits conferred on States by article 2 of the Geneva Convention and article 2 (1), (2) and (3) of UNCLOS, which reserve sovereignty over the TS for coastal States. This contention finds judicial support in the holdings of Berwick C.J. in the *State of New South Wales and 5 others vs. the Commonwealth of Australia* to the effect that:

“...The sovereignty and sovereign rights of which the Conventions speak are available to Australia as a nation state without any executive or legislative act on its part... The rights of which they speak are conferred on the nation State, which unquestionably is Australia and not the constituent States whether regarded individually or collectively.”¹⁶¹

Furthermore, what happens to the domestic laws mentioned are mere omissions which could be rectified by amendments of the various laws by the Nigerian Parliament after the realization of the inadequacies of those laws. This presupposes that once those laws are amended and Nigeria claims the rights bestowed on her by international law, the argument in question 2 on where the sovereignty resides will be a thing of the past. Thus it can be rightly argued in favour of questions (1) (a) & (b) and 2 that the sovereignty and sovereign rights provided for by UNCLOS are all available to coastal States, including Nigeria and on Nigeria alone resides the sovereignty over its TS and as will be demonstrated in chapter four the sovereign rights and the jurisdiction over the CS and the EEZ.

Therefore, where Nigeria's domestic laws claim less rights as in the case noted above than bestowed on her by international law, such omission could not be interpreted to deny Nigeria the sovereignty conferred on her by international law over the TS. In the absence of the domestic laws, or in the failure of them to assert international law rights, Nigeria can always refer and fall back on the provisions of international law to assert its rights over the maritime territory adjacent to its coast.

¹⁶¹ (1976), vol. 50, A.L.J.R., p. 221

4.5 Nature of Nigerian TS since independence

4.5.1 General Nature

By the time Nigeria became independent on the 1st of October 1960, the Geneva Convention on the Territorial Sea and Contiguous Zone and the Geneva Convention on the Continental Shelf of 1958, were applicable to Nigeria. The Territorial Sea Convention unequivocally affirmed the sovereignty of a coastal state over the TS, the airspace above it, including the seabed and subsoil thereof,¹⁶² but left the question of the dimension of the breadth of the TS unresolved. This coupled with the unilateral proclamation of the American President in 1945, which asserts the United States jurisdiction and control over the natural resources of the subsoil and seabed of the CS contiguous to the United States coasts,¹⁶³ encouraged most coastal States, including those that already claimed the three-mile limit and those that claimed other distances to begin to extend their territorial claims beyond their former limits.

Soon after independence, Nigeria initially claimed 12 miles TS,¹⁶⁴ but the twelve miles were later increased to thirty miles through the enactment of the Territorial Waters Decree (Act) of 1967.¹⁶⁵ The thirty- miles claim persisted until 1st January 1998; 12 years after Nigeria acceded to and ratified¹⁶⁶ UNCLOS, which fixed the current 12 miles TS. Therefore by the Territorial Waters (Amendment) Decree,¹⁶⁷ the 30 miles were reduced to 12 miles thereby bringing the breadth of the TS claim of the country in line with the provisions of UNCLOS. Interestingly however, the Territorial Waters Decree (Act) including the amendments thereof specifies the nature of the TS to be only that of jurisdiction and not the sovereignty granted by international law. The omission thus left the question of the nature of the TS of Nigeria to be entirely governed by international law, which declares the authority as that of sovereignty and as submitted above, the omissions do not affect the

¹⁶² Article 2

¹⁶³ Ratiner, L., "United States Ocean Policy: An Analysis," vol. 2 (1970 –71), *Journal of Maritime Law and Commerce*, p.225 at 227

¹⁶⁴ Section 18 (1), Interpretation Act, 1964 in Chap. 192, LFN 1990

¹⁶⁵ Section 1(1), (3), (a) Chapter 428, LFN, 1990

¹⁶⁶ Nigeria acceded to and ratified UNCLOS on the 14th August, 1986

¹⁶⁷ Section 2 (a) & (b) of Decree No. 1, 1998

territorial sovereignty and the sovereign rights of Nigeria over the TS, the CS and the EEZ.

4.5.2 Position under the Independent and Republican Constitutions

It is reasonable to assert that from independence on 1st October 1960, up to the period of intervention of the military dictatorship in the government of the country in 1966, the TS was deemed, as forming part of the territories of the then coastal Regions. This assertion is informed by the provisions of the independent constitution of the country, which provides that “for the purposes of this section the continental shelf of a Region shall be deemed to be part of that Region.”¹⁶⁸

Furthermore, on attaining the status of a Republic in 1963, the Republican Constitution makes similar provisions to the above. By virtue of section 140 (6) thereof, the revenue derived from operations in the CS was to be paid to the Region to which the CS is most contiguous.¹⁶⁹ Thus from independence in 1960, up to the period of military intervention in the political terrain of Nigeria in 1966, fifty percent of the revenue derived from not only mining operations in the TS but from the entire CS was paid to the Regions the constitution considers the CS to be contiguous to. This is so because it is the Regions that were later subdivided to form the present day FCU, through a series of acts of states creation by the Government. Nevertheless, the Federal Government has consistently retained judicial, legislative and the power of control over the maritime territory within its national jurisdiction and its resources.

The situation is even more compounded by the failure of the Territorial Waters Decree (Act) (including the Decree amending it), which is an Act adopted specifically on TS and some other Federal enactments relating to TS to clarify the true character of the Nigerian TS and the interest of the Federal Government therein. It is important in a Federal State like Nigeria for there to be a clear cut division

¹⁶⁸ Section 134 (6) of the Constitution of Nigeria, 1960

¹⁶⁹ The Nigerian Constitution, 1963

between the interests of the Federal Government and those of the FCU, especially with regards to the ownership of the TS, including other maritime zones, the resources therein and the interests of each tier of Nigerian Government in them. A declaration of the true juridical nature of the TS by the laws of the country would probably have indicated to each tier of the government in which of them ownership and control reside. This is necessary because even though the Geneva Conventions and UNCLOS both affirmed the sovereignty of a coastal State over the airspace, the sea-bed and subsoil of the TS, the coastal States, especially the Federal coastal States still need to go further than that by officially proclaiming their sovereignty over it in their domestic laws.

The provisions in the Nigerian legislations regarding the TS are ambiguous and fall short of what obtains in other jurisdictions. This perhaps explains why despite the several and multidimensional approaches adopted by the Government to resolve the controversy between it and the FCU over the ownership of its maritime territory have not yielded the desired results, because a lot of loopholes have been allowed to exist in the domestic laws regarding the maritime territory. This has provided a veritable avenue for the FCU to continue unabated to challenge the basis of Federal Government's authority and control over the entire maritime territory of Nigeria and its right to explore and exploit the resources therein. For instance, Section 1(1) of the Territorial Waters Act provides: "The territorial waters of Nigeria shall for all purposes include every part of the open seas within thirty nautical miles of the coast of Nigeria (measured from low-water mark) or of the seaward limits of inland waters."¹⁷⁰ This provision does not declare in definite terms what the nature of Nigeria's rights over the TS is, whether it is sovereignty or other rights.

The provision in that section can be likened to a mere declaratory statement, which does not carry much legal weight or significance. Most modern maritime legislation of coastal States usually contains provisions on rights in respect of maritime areas,

¹⁷⁰ (1967), Chapter 428, LFN, 1990, as amended by the Territorial Waters (Amendment) Decree, 1998. The 1998 amendment has shortened the breadth of Nigeria's TS to 12 nm

this reflects in most cases sovereignty of the coastal State in respect of the TS, and in archipelagic States, sovereignty in respect of archipelagic waters. This sovereignty is usually expressed to cover the TS, the air-space, sea-bed and the subsoil beneath. In countries that adopted a single maritime legislation to define their maritime zones, apart from specifically enumerating their maritime areas, which in most cases may include internal waters, TS, archipelagic waters (in archipelagic States), such legislation usually goes further to state the coastal State's rights in respect of CZ and rights in respect of the EEZ and the CS. The Nigerian Territorial Waters Act is lacking in most of the important areas mentioned. In fact, no legislation is known for example to have declared the country's interest in the CZ and in the rest parts of the CS beyond the EEZ.

Based on the provisions of Section 1 (2) and 2 of that Act for example, three issues can be identified. The first is Nigeria's claim over the TS, the second is its entitlement under international law and the third is what right Nigeria has by its own domestic law vested on itself. Consequently, Nigeria it may be argued claims only the rights of jurisdiction over her TS as opposed to the sovereignty granted her by international law. Section 2 (1) provides that, any act or omission which –

- (a) is committed within the territorial waters of Nigeria, whether by a citizen of Nigeria or a foreigner; and
- (b) would if committed in any part of Nigeria, constitute an offence under the law in force in that part shall be an offence under that law and the person who committed it may, subject to section 3 of this Act, be arrested, tried and punished for it as if he had committed it in that part of Nigeria....¹⁷¹

There is nowhere in that Act that Nigeria specifically claimed sovereignty over its TS, the seabed, subsoil and the airspace above. This is contrary to the sovereignty granted by UNCLOS and it is a very grave omission that requires immediate amendment by the Nigerian Parliament.

¹⁷¹ Ibid

The drafters of that Act must have assumed, (though very wrongly), that the mere mention of 'territorial waters' in the Act automatically includes the air space, sea-bed and subsoil of the TS. This is not true, it is trite law that, though sovereignty over the air space, the water column of the TS and the subjacent sea-bed and subsoil below it gained general acceptance by the international community at about the same time, yet some differences exist between them. For instance, it can be argued that the sovereignty of the coastal State over the air space, and subsoil of the TS is exclusive; the same cannot be said of the water column, which is subject to the right of innocent passage by foreign ships. The exclusive sovereignty of a coastal State over the airspace above its TS, though it is not specifically provided for in international instrument, but may nevertheless be subject of an exception in the case of aircraft in distress.

Furthermore, the process of crystallization of sovereignty over the air space above the TS and that of the sea-bed and subsoil is equally different. While sovereignty over the airspace above the TS had become accepted and incorporated in the Paris Conference on a Convention for the Regulation of Aerial Navigation of 1919 and in the 1944 Convention on International Civil Aviation, the same cannot be said of the process of crystallization of sovereignty over the sea-bed and subsoil of the TS, where it could not as a result of lack of consensus among States be incorporated in any international instrument until 1930, when it was agreed that an article be included in the Hague Conference text on TS stating that the territory of a coastal State includes also the air space above the TS, as well as the bed of the sea, and the subsoil.¹⁷² On the whole, sovereignty over the airspace, sea-bed (subject to the right of innocent passage), and the subsoil of the TS finally became incorporated in international law by virtue of the provisions of Article 2 of Geneva Convention on the Territorial Sea, 1958 but that Convention failed to stipulate the breadth of TS upon which a coastal State should exercise the sovereignty. However, Article 2 (1) (2) and (3) of UNCLOS 1982 has now improved upon the provisions of the Geneva

¹⁷² Churchill and Lowe, *op. cit.*, p. 76; League of Nations Doc. C.351 (b). M. 145 (b) 1930 v, p. 213; Rosenne, S., *League of Nations Conference for the Codification of International Law*, (1930) Dobbs Ferry, N. Y., Oceana, 1975, p. 1415

Convention by providing for the sovereignty of the coastal States over the TS and the breadth thereof.

Furthermore, the Act does not contain provisions relating to the type of baselines that Nigeria would adopt for the measurement of its TS, thus what constitute Nigeria's internal waters and the baselines for measuring her TS has become a matter for speculation and uncertainty. Similarly, the Act does not make reference to charts, geographical co-ordinates and their publication in conformity with the requirement of UNCLOS.¹⁷³ It is not clear how the above requirements have been complied with by the maritime practice of the country.

Most federal States in apparent realisation of the consequences of any ambiguity in laws regarding the TS have overtly made provisions claiming sovereignty over the TS, the airspace above it, the seabed and the subsoil of the TS. Thus in a proclamation dated 27th, December, 1988, the United States in very clear and unambiguous language claims a 'territorial sea extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the TS, as well as to its bed and subsoil.'¹⁷⁴ Similarly, in the preamble to the Australian Seas and Submerged Lands Act (as amended), it is expressly provided as follows; "Whereas a belt of sea adjacent to the coast of Australia, known as the TS, and the airspace over the TS and the bed and subsoil of the TS, are within the sovereignty of Australia."¹⁷⁵

Further to the above, article 2(4) of the Russian Federation Act provides, the sovereignty of the Russian Federation extends to the TS, the airspace over it and also its sea bed and subsoil, with recognition of the right of innocent passage of

¹⁷³ See Article 16 on charts and geographical co-ordinates and Article 17 on innocent passage

¹⁷⁴ Territorial Sea of the United States of America, by the President of the United States of America, a Proclamation of 27 December, 1988; <http://www.un.org>

¹⁷⁵ Australia; Seas and Submerged Lands Act 1973, as amended by the Maritime Legislation Amendment Act 1994.(emphasis added)

foreign ships through the territorial sea.¹⁷⁶ This practice is apparently not restricted to federal States alone, majority of States that have assented to the two Conventions have had claim to sovereignty over their TS incorporated into their national laws. Such countries include, France, United Kingdom, Tunisia, Egypt, Morocco Sierra Leone, Equatorial Guinea and Ghana, to mention just a few.¹⁷⁷

The failure of the Territorial Sea Act and the amendment thereof to assert the sovereignty of Nigeria over the TS and the rights endowed in it by both the Geneva Convention and UNCLOS is not limited to that act alone. Nigeria's 1999 constitution is equally deficient and lacking in provisions asserting the country's sovereignty over the TS and the rights over other maritime zones. Even the boundaries (both land and maritime) of Nigeria were vaguely described in that constitution. The only section of the constitution which relates to the territorial extent of Nigeria is section 2(2) which talks of Nigeria being a federation and section 3 (1) and (2). Section 3(1) merely enumerates the states of the federation by their names and subsection (2) states that "each state of Nigeria named in the first column of part 1 of the first schedule to this constitution shall consist of the area shown opposite thereto in the second column of that schedule."¹⁷⁸

A close examination of the first column of part 1 of the first schedule referred to in subsection (2) above merely shows the name of each state and the local

¹⁷⁶ Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation (1) of 17th July, 1998

¹⁷⁷ France, Article 1 of Law no. 71 – 1060 of 14 Dec. 1971 regarding the delimitation of French Territorial Waters; United Kingdom, Section 7 which is the interpretation section of the Territorial Waters Jurisdiction Act, 1878 refers to 'territorial waters as deemed by International Law to be within the territorial sovereignty of Her Majesty;' Tunisia, Article 4 of Act No. 73 – 49 delimiting the territorial waters of 2nd August, 1973; Egypt, Article 7 of Decree Concerning the Territorial Waters of the Arab Republic of Egypt of 15 Jan. 1951, as amended by Presidential Decree of 17 Feb. 1958; Morocco, Article 1 of Act no. 1. 73.211 establishing the limits of the territorial waters and the Exclusive Fishing Zone of Morocco, of 2 March 1973; Sierra Leone, Article 2 of The Maritime Zones (Establishment) Decree, 1996; Equatorial Guinea, Article 1 of Act No. 15/1984 of 12 Nov. 1984 on the Territorial Sea and Exclusive Economic Zone of the Republic of Equatorial Guinea (1); Ghana, Section 2 subsections 1 and 2 of Maritime Zones (Delimitation) Law, 1986 and India, Article 3(1) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, Act No. 80 of 28 May 1976, all make provisions claiming sovereignty over their territorial waters

¹⁷⁸ Constitution of the Federal Republic of Nigeria, 1999

governments that make up that state and nothing more. The extent of the boundary of each local government in the FCU into the sea and the nature of governmental power and control over it are not stated, hence giving the impression that the boundary of each local government area within the FCU ends at the terminal of the land territory and does not include the sea area. However, in practice the Federal Government continues to exercise legislative, executive and other powers over navigation, fishing, exploration and exploitation of mineral resources.

Furthermore, in apparent realization of the lapses in the country's maritime legislation, especially as it affects the juridical nature of the TS and the theory of governmental power and control over it, Nigeria enacted the following legislation in-order to rectify the anomalies. The first in the series of such legislation is the Minerals and Mining Decree, Section 1 (1) and (2) of which vests the entire property in and control of all minerals in, under or upon any land in Nigeria, its contiguous Continental Shelf and of all rivers, streams and water courses throughout Nigeria, any area covered by territorial waters or constituency, the Exclusive Economic Zone in the Government of the Federation for and on behalf of the people of Nigeria.”¹⁷⁹ The provisions in the Act quoted above are all fours with the provisions of sections 40 (3), 42 (3) and 44(3) of the 1979, 1989 and 1999 Constitutions respectively. Section 44 (3) of the 1999 Constitution for instance provides that:

Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Furthermore, section 1 (1) & (2) of Offshore Oil Revenues Decree provides as follows:

¹⁷⁹ Decree No. 34 of 10th May, 1999

(1) Section 140 (6) of the Constitution of the Federation (which provides that the Continental Shelf of a state shall be deemed to be part of that state) is hereby repealed.

(2) Accordingly –

(a) The ownership of and the title to the territorial waters and the Continental Shelf shall vest in the Federal Military Government; and

(b) All royalties, rents and other revenues derived from or relating to the exploration, prospecting or searching for or the winning or working of petroleum (as defined in the Petroleum Decree 1969) in the territorial waters and the continental shelf shall accrue to the Federal Military Government.¹⁸⁰

Another legislation with similar provisions as above is the Petroleum Act, section 1 of which provides as follows:

(1) The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.

(2) This section applies to all land (including land covered by water) which –

(a) is in Nigeria; or

(b) is under the territorial waters of Nigeria; or

(c) forms part of the continental shelf.¹⁸¹

The question that readily comes to mind is whether the aforementioned provisions have thus cured the ambiguity inherent in the earlier enactments.

A look at section 1 (1) & (2) (a) and (b) of Offshore Oil Revenues Decree mentioned above, would seem to suggest that the ambiguity or the failure noted in the Territorial Waters Act and other domestic laws of Nigeria mentioned above have thereby been cured. This Decree uses the word ‘vest’ and not ‘sovereignty’, which appears weightier and more in conformity with the actual right granted by UNCLOS than the word ‘vest.’ This is replica of similar omissions contained in the Territorial Waters Act and in the Nigerian Constitutions noted above, which both

¹⁸⁰ Decree No. 9 of 1971

¹⁸¹ Chapter 350, LFN, 1990

failed to claim Nigeria's sovereignty over the airspace, seabed and subsoil of the TS and the failure of the laws noted above to declare Nigeria's rights over the other maritime zones.

Another worrisome aspect of the above enactment is the claim of ownership and title, which it makes with respect to the CS. Article 77 (1) it should be noted confers only sovereign rights on Nigeria and by virtue of Article 80, which makes Article 60 applicable to the CS, Nigeria may be said also to possess the right of jurisdiction over the CS. It is therefore a violation of these articles to enact a law, which claims ownership and title over the CS. Furthermore, the word 'vest' as used in that Act is also suggestive of snatching something from the real owner and given to another it therefore does not seem to cure the doubts and anomalies in the earlier enactments. The basis upon which the Federal Government is vesting ownership and control of maritime resources on itself is equally doubtable without first declaring the prerequisite sovereignty over the zone. The section of the Petroleum Act cited talks of ownership and control of all petroleum but not the sea areas that harbour the petroleum; it therefore has not filled the lacunae in the Territorial Waters Act.

4.5.3 Implications of the omissions above for the nature of the TS

The various omissions noted above no doubt have opened up a further channel for the continued disputation of the maritime territory of the country and its resources between the FCU and the Federal Government. The omissions have also led to a resurgence of the controversy surrounding the juridical nature of the TS. Thus in *Abia case*, the Supreme Court of Nigeria made two outstanding statements which portray the unsettled nature of the juridical nature of the TS of Nigeria. The first statement was made by Uwais' (CJN as he then was) as follows:

"Chief Williams [late Senior Advocate of Nigeria] has tried to show this by inference or implication under the provisions of the Territorial Waters Act, the Sea Fisheries Act and the Exclusive Economic Zone Act, all of which made reference to the territorial waters of Nigeria. However, with respect, none of the legislations (sic)

expressly defines the seaward boundary of the littoral states. This in my opinion cannot be inferred from the legislations (sic).”¹⁸²

In the first place the above statement is flawed because of the misconception relating to littoral state. Littoral State is generally used to refer to an independent sovereign coastal State and not a federating unit of a federation in the sense that the Supreme Court has used it above. Furthermore, the lapses noted explains the reason why the Supreme Court had to resort to the principles of international law to arrive at its judgment in that case- a purely domestic matter. This is not to say however that it is wrong to apply international law to resolve domestic matter, settled principles of international law can be resorted to in order to supplement and support domestic law in order to resolve domestic matters where the domestic law on the matter is unclear or uncertain and incomplete and the matter in question relates to international law.¹⁸³ As will be shown in chapter four, the U.S. Supreme Court applies international law in deciding the submerged land cases.

Secondly, the lapses in the laws also led to the defendants’ arguments in *Abia case*, that:

‘by sections 2(2), 3(1) and (2) and the first schedule to the constitution, Nigeria consists of the aggregate of the territories of all the 36 states of the Federation and the Federal capital Territory and that, constitutionally, therefore, Nigeria cannot have any other territory outside this aggregate....’¹⁸⁴

¹⁸² Supra, pp. 721 – 722

¹⁸³ Langan P. St. J. (ed.), *Maxwell on Interpretation of Statutes*, 12th edition, Sweet and Maxwell, London, (1969), p.183 – 186 and John B. and George E., (eds.), *Cross Statutory Interpretation*, 2nd edition, London, Butterworth (1987), p. 162 – 164. For example, international law was resorted to in the determination of the following cases, *Jones vs. United States* (1890) 137 US 202, 212; *Fong Yue Ting vs. United States* (1893) 149 US 698, 706 – 711; See also, Charney, J.I., “The Delimitation of Lateral Seaward Boundaries between States in a Domestic Context,” vol. 75, (1981), *A. J. I. L.*, p. 28 – 68.

¹⁸⁴ Supra, p.647

The reply given to the above argument by the counsel to the Federal Government – a reply which the Supreme Court adopted without query is to the effect that, ‘the seaward limit of Nigeria is the low-water mark but that Nigeria in its sovereignty and by the custom of the international community exercises ‘jurisdiction’ beyond that limit.’¹⁸⁵ The reply and the court’s reliance on it cannot be supported by any correct legal reasoning, especially as it equates Nigeria’s authority over the TS to that of mere jurisdiction – a jurisdiction which the court ruled that it does not extend to offences committed by foreigners on the TS of Nigeria. It is equally not true that the seaward limit of Nigeria’s boundary is low-water mark. However, the reply of the plaintiffs’ counsel and the subsequent affirmation of it by the Supreme Court has one importance and this is to the effect that it further buttresses our argument above that by the provisions of the Territorial Waters Act, the Constitutions and other national legislation, Nigeria has not claimed the sovereignty bestowed on coastal States by both the Geneva Convention and UNCLOS, but by its laws, she merely claims the right of jurisdiction over the TS and ownership of the natural resources in the seas but not the seas themselves.

VIII. Conclusion

In an attempt to determine the true juridical character of the TS, we began by examining the various stages the concept went through before the idea of three miles TS was muted and accepted by the major maritime powers. We argued that the three miles was not unanimously accepted by a number of coastal States and as a result it did not attain the standard of international customary law. Having examined the various theories and postulations about the true juridical character of the TS, we concluded that its character is that of dominium and imperium so that it forms part of the national territory of the adjoining State. We argued that the Anglo-German Treaty of 1913 and the *AG Southern states vs. John Holt*¹⁸⁶ provide evidence in support of the contention that Britain introduced to Nigeria the idea of three miles TS.

¹⁸⁵ Ibid, p.647 – 648

¹⁸⁶ Supra

It is concluded based on the statutes and orders in-council examined that the limits of Nigeria's TS before the 1982 UNCLOS, was the three-mile limit introduced by Britain. We argued in this respect that though the 1958 Geneva Convention and even UNCLOS granted sovereignty over the TS to Nigeria as a nation, but that by the laws in operation at that time, particularly the Territorial Waters Act, Nigeria did not take the benefit of that convention to assert her sovereignty over the TS. This it is argued is not enough to deny Nigeria of her international law rights over all the aforementioned maritime zones and that it is Nigeria as an entity and not the FCU that possesses the necessary international legal personality to claim the rights granted by UNCLOS over the TS and as will be shown in other chapters in all other maritime zones adjacent to Nigeria. A point was also made to the effect that the former rights exercised by the Kingdoms and Empires before colonisation were transferred to the British government after colonisation through the processes of cession and colonisation. At independence therefore, Nigeria through the process of state succession acquired all the former rights of the British government over the entire maritime areas of Nigeria. Not only that the rights also vest as customary international law rights regardless of:

- (a) Constitutional amendments or
- (b) Enactment of domestic legislation.

Chapter three

The juridical nature of the EEZ of Nigeria: problems of law and theory

I. Introduction

In view of Nigeria's problems relative to maritime areas, this chapter attempts to trace the evolution of the EEZ as a legal concept. In doing this attention will necessarily focus on the extent to which the concept could be argued is an offshoot of the CS concept, which in itself originated from the Truman's proclamations of 1945. The contributions and effects of the proclamations by the Latin American and the Arab States including the 1958 Geneva Conventions to the evolution of the EEZ concept will equally be a focal point in the attempts to determine the true juridical nature of the concept. We shall examine the various concepts that were initially put forward before EEZ became finally incorporated in UNCLOS 1982 as the most enduring and acceptable name. After this we shall carry out an in-depth examination of the concept itself in order to determine its actual and true juridical nature. There is also the need to examine how state practice and Nigerian domestic laws reflect the juridical nature of the EEZ. That is whether Nigeria or other States by their practices consider the EEZ as forming part of the High seas or the TS or whether they consider it as possessing a separate legal regime different from that of the High Seas or better still whether it is a *Sui generis* zone.

A determination of the true juridical character of the EEZ is particularly important, especially to Nigeria in a number of ways. First, it is important because such a determination would help Nigeria – a federal State already embroiled in controversies over title to the maritime territory and its resources with its coastal units - to make a proper distinction between EEZ and the TS. Successful separation of the TS from the EEZ for treatment, would strengthen the Federal Government's claim over the sea areas, in that as the concept of EEZ, like the CS, did not exist during the pre-colonial time when there was no Nigeria in existence and the FCU controlled and exercised a measure of control and authority over a narrow sea area

adjacent to their coasts, they would have no basis to controvert Nigeria's claims over the EEZ and the CS.

Secondly, since allocation of revenue to the federating units by the Federal Government is determined by the amount of revenue realised from the resources found within the territory of a federating unit, correct determination of the juridical nature of the EEZ would assist the Federal Government in separating revenue realised from the TS from that realised from the EEZ and in the allocation thereof to the units.

Thirdly, correct determination of the true juridical character of the EEZ will help Nigeria in separating its rights and duties over the zone from that of the waters overlying it and in the planning of its maritime policies in such a way that will not infringe upon the rights and duties of other States over the zone.

Fourthly, examining the nature of the EEZ is important because, presently Nigeria does not have any legislation declaring its rights and duties over the CS. Examination of the nature of the EEZ will therefore expose this lapse and the urgent need for a domestic legislation on the CS. This in turn will help to distinguish between the rights over the CS and rights over other maritime zones and will help in strengthening the Federal Government's claim over it.

II. Evolution of the EEZ as a legal concept

1. General comments

The emergence of the EEZ as a legal concept could be traced to a number of different factors, some of which are discussed below.

2. Impact of Truman Proclamations of 1945

The concept of EEZ is a recent development in the annals of international law of the sea and it has been described as the most outstanding and revolutionary transformation of the law of the sea, brought about by the developing countries in

the last four decades or so¹. It is a concept, which has invariably received very rapid and general acceptance by the members of the international community; it could well be described as having become part and parcel of customary international law. It emanated in the first place as a reaction of some states to the unilateral proclamations made by the American President, Harry Truman, on September 28, 1945. The proclamation though it was made with respect to the CS of the United States, it is seen by many as the planting seed of the EEZ concept.² The Presidential proclamations were two in number and the first is with respect to the natural resources of the subsoil and the seabed of the CS, and the second has to do with coastal fisheries in certain areas of the high seas. The Fishery Proclamation for example establishes conservation zones in the high seas, contiguous to the coasts of the United States. Upon the zones, fishing activities were to be regulated and controlled solely by the United States and for its nationals or by joint agreement where other nationals participated.³

The first proclamation, which is the most important as far as this study is concerned, asserts United States jurisdiction and control of the natural resources of the subsoil and seabed of the CS contiguous to the United States coasts.⁴ The role it played in the evolution of the concept of EEZ probably led Duke Pollard to have commented thus:

“By any criterion of assessment it would be difficult to deny that the claim advanced by President Truman on behalf of the Government of the United States in

¹ Brown, E., “Maritime Zones: A survey of claims’ in *New Directions in the Law of the Sea*,” Vol. III, Oceana Publications Inc., Dobbs Ferry, New York (1973)

² Duke E. Pollard, “the Exclusive Economic Zone: The Elusive Consensus”, vol. 12, No. 3, (1974 – 75) *San Diego Law Review (SDLR)*, pp. 600 – 623 at 605

³ Dahmani, L., *The Fisheries Regime of the Exclusive Economic Zone*, Dordrecht, (1987), p.14

⁴ Ratiner, L., “United States Oceans Policy: An Analysis,” vol. 2, (1970 -71) *Journal of Maritime Law and Commerce* p.225 at 227; See also, Nelson, L.D.M., “The Patrimonial Sea” vol. 23, (1973) *ICLQ*, p. 668 at 669

respect of the non-living resources of the continental shelf ...was a claim to an economic zone of exclusive coastal state jurisdiction”⁵

Most writers have been more concerned in their treatment of this topic with the international implications of Truman’s proclamation and have thereby neglected the domestic aspect of it. It must be remembered that at the time the proclamation was issued, United States Government was already engrossed in controversies over the ownership and control of the maritime territory with the coastal units. There was also the need to provide legal underpinnings for the regulation of the petroleum industry which was then in dire need of regulatory authority in order to protect and guarantee security of investment and favourable tax treatment.

Therefore, while it may be true that the proclamations have international connotations, it may well be true too that they equally possessed domestic connotations, if only to preempt the claims of the US coastal states, which as at that time were already subjudice at the US supreme court.⁶ If it were not the domestic connotation underlining the proclamation, one may be prompted to argue that the proclamation was unnecessary; especially at the time it was issued. This is because as at that time, no other nation had the technical expertise or capability or the machinery the like of the US to explore and exploit oceanic resources close to the United States coasts or the coasts of any other nation and by the doctrine of international law regarding the freedom of the high seas, United States had the right just like any other nation to exercise the freedom of the seas by exploring and exploiting the resources therein.⁷ The proclamation was therefore partly intended to send a warning signal to the various US coastal states about the impending action of the Federal Government to wrest the ownership and control of the maritime territory off the coasts of the United States from them.

⁵ Op. cit., n. 2; See also, Friedman, W., “Selden Redivivus – towards a partition of the seas”, vol. 65 (1971), *A.J.I.L.*, p.763 and Jennings, R. Y., “A changing law of the sea” vol. 31 (1972), *Cambridge Law Journal*, pp. 32 - 49

⁶ U. S. Vs. State of California, United States Supreme Court Reports – Lawyers Edition (Annotated), 14 L. Ed. 2d; 381 US 139, 14 L. ed. 2d 296

⁷ Ibid, p.228 – 229

However, it was not immediately realized at the time the proclamation was made that an action by an important nation such as the United States would trigger a chain of reactions by other nations, both strong and weak, and small or big. This is particularly true of the claims made by some Latin American and other States, who claimed sovereignty not only over the CS but also over the waters overlaying it. Therefore, the Truman Proclamation was immediately followed by the Declaration of Mexico of 29 October 1945 and the Argentinean Proclamation made through the country's Presidential Decree of October 11, 1946. Argentina's Proclamation is particularly interesting because it contains provisions, which assert the country's sovereignty not only over the CS but also over the water column on top of it. Articles 1 and 2 of the Proclamation provide as follows; Article 1, "It is hereby declared that the Argentine Epicontinental Sea and continental shelf are subject to the sovereign power of the nation". Article 2 on the other hand provides, "For the purposes of free navigation, the character of the water situated in the Argentine Epicontinental Sea and above the Argentine continental shelf, remains unaffected by the present declaration".⁸

The claims of Mexico and Argentina were closely followed by similar claims made by Chile, and Peru, who though they possess little or no CS off their coasts, yet were in the forefront in making such claims. The two countries, in order to compensate for their natural handicap in not possessing CS and draw to themselves political support over their bid to control the fisheries in the waters adjacent to their coasts, each claimed 200 nautical miles of maritime zones. This was done by Chile through the Presidential Declaration Concerning Continental Shelf of June 23, 1947 and Peru, through Presidential Decree No. 781 of August 1, 1947. Other States that made similar claims as above include, Costa Rica through Decree – Law of July 27, 1948 and El Salvador through Article 7 of the Constitution of 1950. The question is why the 200nm claim?

⁸ See Latin American Thesis in <http://www.cpps-int.org/english/nosotros/tesislatinoamericanas.htm>

3. Reasons for the 200 nm claim by Chile, Ecuador and Peru

A number of reasons accounted for the 200nm maritime claims. The first is based on the Truman Proclamation. According to these countries, since the United States had a unilateral right to claim the resources of the seabed adjacent to its coasts to the exclusion of all other countries, they too had a similar unilateral right to make claims consistent with their own national interests.⁹

The second reason is the geographic, geologic and biologic characteristics of the coasts of Peru, Ecuador and Chile and the need for rational utilization of the resources of the adjacent sea areas,¹⁰ particularly fisheries within 200 nm.

Thirdly, a window of opportunity presented itself when the Allied Powers declared a Security Zone off Chile. This was drawn on a map, which was printed in a magazine. The map is about the Panama Declaration of 1939, in which Britain and the United States agreed to establish security and neutral zone around the American continent so as to prevent the re-supplying Axis ships in South American ports. That map showed the dimension of the security zone off the coast of Chile to be 200 nm; this has been argued to form the basis of the claim by Chile.¹¹

The fourth reason is what O'Connell has traced to be the desire by Chile to protect natural resources. This informed the June 23 1947 Declaration made by the President of Chile, which was followed by other Declarations by Peru and Ecuador.¹²

The question then arises as to the extent that the Latin American states' claims may be said to be consistent with or are in conformity with Truman and the Mexican proclamations on which they have argued their claims, are anchored.

⁹ Lecuona, D.C., "The Ecuador Fisheries Dispute," vol. 2, (1970), *Journal of Maritime Law and Commerce*, p. 91

¹⁰ Peruano, E., "Gaceta Oficial de 11 Agosto 1970," translated by the author under paragraph 2 of the Declaration of Montevideo, vol. 2, (1970), *Journal of Maritime Law and Commerce*, p. 224

¹¹ Stevenson, J. R. and Bernard H.O., "The United Nations Conference on the Law of the Sea: The 1974 Caracas Session", vol. 69, (1975) *A.J.I.L.*, p.1

¹² O'Connell, D.P., *the International Law of the Sea*, vol. 1, Clarendon Press, Oxford (1982), p. 553



Though the claims of these countries expressly recognized the freedom of navigation, their declaration of sovereignty over the epicontinental sea, went far beyond what was claimed by the 1945 Truman's proclamation, which provides in clear terms that the character as high seas of the waters above the CS and the right of their free and unimpeded navigation are in no way affected.¹³ It may be argued therefore, that the claims were extravagant and thus, constituted a dangerous precedent capable of causing international conflict. The claims generated so many criticisms and protests by the international community; some queried the acceptability and basis of the claims by some of the States agitating for extended maritime jurisdiction.

4. The influence of the Arab Declarations of 1949

The Truman's Proclamation influenced not only the Latin American States; it also led to similar claims being made by certain Arab States and Emirates. Some of these States took advantage of the proclamation to unilaterally extend their individual maritime zones.¹⁴ The focal points of the declarations were on the petroleum resources of the CS, upon which the States and the Emirates claim sovereignty. Apart from this, the proclamations also declare the jurisdictions of those States over the seabed and subsoil of the CS adjacent to their coasts and the recognition of the freedom of navigation and that of flight over the zone. The various declarations reflected the growing interests of coastal States in the extension of the adjacent sea areas, brought about, first by the Truman Proclamation and the widespread dissatisfaction about the existing legal regime or the lack of it.

5 The role of Geneva Conventions of 1958 in the evolution of EEZ

¹³ (1946) 40 (Supplement) A.J.I.L., p. 46

¹⁴ Saudi Arabia for example made its own declaration on the 28th May, 1949; while Bahrain made its own on, 5th June, 1949; Qatar, 8th June, 1949; Abu Dhabi, 10th June, 1949; Kuwait, 12th June, 1949; Dubai, 14th June, 1949; Sharjah, 16th June, 1949; Ras al Khaimah, 17th June, 1949; Umm al Qaiwain, 20th June, 1949 and Ajman on the 20th June 1949. See Dahak D., *Les Etats Arabes et le Droit de la Mer, Tome 1*, Casablanca, Les Editions Maghrébines, (1986), p. 123

First and foremost, the concept of EEZ was postulated because of the unsatisfactory nature of some provisions of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, which was expected *inter alia* to establish a compromise between the adherents of the classical doctrine of freedom of fishing on the high seas and the supporters of the more extensive exclusive fishing zones. The rights of the coastal states, which were sought to be protected by the convention, were circumscribed by a number of its articles, such as Articles 5, 6 and 7 etc. Particularly, the rights of the coastal States were circumscribed by the criteria laid down by the provisions of article 7 (2) thereof, hence the renewal by states of the earlier 200-mile claim.

The 1958 conference, which was expected to provide the much-needed solution to the coastal state's jurisdiction over fisheries beyond TS, could not, because it failed to make provisions for Fishing and Conservation of the Living Resources of the High Seas. Instead, Article 6 of the Convention attempted to maintain a balance between the advocates of the classical doctrine of freedom of the high seas and those advocating a coastal state's jurisdiction by recognizing only the special interest of coastal States in the maintenance of productivity through the establishment of conservation zones and providing under article 2 of Geneva Convention on the Continental Shelf for the incorporation of CS doctrine, that is, the exclusive right of a coastal State to the resources of the shelf. Even the provisions of Article 7 (1),¹⁵ which authorizes any coastal State to maintain productivity through the establishment of conservation zone were circumscribed by the provisions of article 7(2), which imposes limitations on the unilateral measures adopted by the States for conservation as follows: The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

- (a) that there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;

¹⁵ Ibid

- (b) that the measures adopted are based on appropriate scientific findings;
- (c) that such measures do not discriminate in form or in fact against foreign fishermen.

It is equally circumscribed by the dispute settlement procedure laid down under articles 9 to 12.

The court had occasion to comment on the failure of the Fishing Convention to include a provision, which guarantees the right of coastal States to fisheries jurisdiction beyond the TS in the dissenting opinion of Judge Fitzmaurice in the *Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland vs. Iceland)*. Judge Fitzmaurice commented thus:

clearly therefore the Convention (Geneva) reserved nothing to the coastal State by way of exclusive fishery rights, except in what might be called in general terms, sedentary fisheries. It afforded no ground for the assertion of exclusive fishery rights in waters outside the territorial sea, and therefore high seas.¹⁶ This was why Chile, Ecuador and Peru refused to become parties to it and Iceland, Uruguay and Costa Rica were mere signatories to it, but never ratified it. The shortcomings of the 1958 conventions therefore, led to a further resurgence in extended maritime claims by the States.

Several factors acted as catalysts to the extended maritime claims. First and foremost was the decision of the international court of justice in the *Anglo Norwegian Fisheries Case*¹⁷, between the United Kingdom and Norway seen in many quarters as one of the motivating factors in the quest for maritime extension by majority of coastal states. That decision affirmed the Norwegian straight baselines practice, which had precisely the effect of subjecting large parts of the high seas to Norwegian sovereignty, thus violating the principle that no state may

¹⁶ (1973), ICJ Reports, p. 27. See also, the North Sea Continental Shelf Case (1969) ICJ Reports, p.37

¹⁷ (1951) I.C.J. Reports 132; See also, McDougal, M.S. and Burke, W.T., "Crisis in the Law of the Sea: Community Perspectives versus National Egoism," vol. 64, No. 4 (1958), *The Yale Law Journal*, p.539 at 540

validly purport to subject any part of the high seas to its own sovereignty, a method of straight baseline now copied by many other coastal States some of whom may not be able to show equally convincing evidence in support as the Norwegian example.

Secondly, just as the case above acted as catalyst to extended maritime claims by some coastal States, so also did the so-called “Cod Wars” between Iceland and the United Kingdom. The first of the wars took place in 1958 and was as a result of Iceland’s extension of its fishing limits from 4 to 12 miles claiming the extension was because of the special dependency of its economy on fishery resources. The second took place between 1972 and 1973, when Iceland extended the fishing limits from the previous 12 miles to 50 miles. The third, which is the latest, took place in 1975 and concerned fishing rights and the limits of the rights between Iceland and the United Kingdom. This was at a time that Iceland extended its zone of control over fishing from 50 miles to 200 miles off its coast. After a few skirmishes between the two countries, an agreement was reached by which Britain agreed to follow Iceland’s regulations establishing the 200 mile economic exclusion zone, and to limit the cod catch to 50,000 tons. After the lapse of this agreement, Britain lost its rights to fish in Icelandic waters within the 200 mile exclusion zone.¹⁸ The result of the cod war as in the decision in *Anglo – Norwegian Fisheries case* no doubt serves as another catalyst in the extended maritime claims by other coastal States.

The third reason is that, there was a relative increase in fishing activities as compared to the period shortly before 1958, due to improved technology in fishing vessels, which made fishing in distant waters possible. During this time too, many African and Asian states had emerged from colonialism as independent States and many of them like Nigeria for example, were already aware of the presence of natural resources of economic value in the ocean areas adjacent to their coasts.

¹⁸ Kassebaum, “Ice case studies,” in <http://www.american.edu/ted/ice/CODWAR.htm> (visited on 09/10/2006)

There was therefore a strong desire to acquire as much ocean space as was possible under international law, so as to control as much of those resources as possible for the economic development of their respective states and for the benefit of their peoples, whom they argued have been long impoverished by reason of colonialism.

Fourth, is motivated by desire for *exclusive* control over fishery and other marine resources by the West African States. This desire was informed by the fact that, most of the fishing activities, especially in the West African sub region were carried out by foreigners just off the coasts of the States in that region without any benefits whatsoever to them. As a matter of fact, some of the fishermen used very sophisticated fishing vessels that did not require the need to make use of port facilities of those States, thereby helping them avoid payment of port dues to the adjacent coastal States.

Fifth, the desire for wider maritime claim by States, especially Nigeria has to do with security and espionage. Nigeria at this time was just emerging from a very bloody civil war; there was therefore the fear of espionage activities that were being carried out across the sea in close proximity to the shores. Nigeria therefore supported the idea of the EEZ that was at that time being debated by States. It was thought that once the proposal on EEZ jurisdiction was accepted, such propensity would be removed.¹⁹ These States closed ranks with their counterparts in other parts of Africa to present a united and formidable claim over extended maritime space during the third United Nations Conference on the Law of the Sea.

The sixth was the alleged secret *Modus Vivendi* between the United States and Ecuador, which was thought, had been in existence for some time, but which only became a matter for the public knowledge in June, 1965, served to ignite the resurgence of extended maritime claim by the Latin American states.²⁰ The *Modus* was a secret agreement in which the US agreed to respect 12-mile Ecuadorian

¹⁹ Third United Nations Conference on the Law of the Sea, Official Records, vol. 1 p. 139

²⁰ Loringe, D.C., "The United States – Peruvian 'Fisheries Dispute'", vol. 23, (1971) *Stanford Law Review* P. 391- 453 at 408; Nelson, L.D.M. op. cit. n. 3, p. 674

jurisdiction to tax foreign fishermen and an exclusive fishery jurisdiction in the 12 mile zone. On its part Ecuador agreed to grant licenses to the US fishermen and refrain from seizures beyond the 12-mile limit, a move which has been interpreted in many quarters as a renunciation of the 200- mile limit.

6. How States resisted the EEZ/200 nm idea

In order to resist the 200-mile claims by the Latin American States, the United States and the then Soviet Union concluded a plan to organize a conference on the law of the sea with some specific issues slated on the agenda. The issues include, among other things, gaining acceptance for a 12 mile TS with an equal limit for fishery jurisdiction; the question of the freedom of transit across international water ways or straits and creating machinery to accommodate the “special interests” of coastal States in matters of conservation and fishing in the high seas beyond the 12 mile TS. Even though the above were important the Latin American countries still saw the moves as suspect; hence the resurgence of the extended maritime claims, a claim, which spread to the newly independent States of Africa and Asia.²¹

7. Latin American States contributions

7.1 The concept of patrimonial sea as a consolidation of Latin American States Maritime claims

The various Declarations by the Latin American and the Arab States were regarded by the majority of States as extravagant. This necessarily gave the Latin American States the impetus to put forward the concept of patrimonial sea to serve as a compromise between the norms of classical international law of the sea and the more far reaching maritime claims made by some coastal States. A Chilean diplomat, Edmundo Vergas Cerreno in a report he presented to the Inter – American Juridical Committee, made the first mention of the concept of patrimonial sea in 1971. Thereafter, the concept found its first exposition on the international plane

²¹ For example, two more Latin American states of Uruguay and Brazil extended through legislations their territorial waters to 200 nautical miles. Uruguay did this through Law 13.833 of Dec. 23, 1969 and Brazil through Decree – Law 1.098 Concerning the limits of the territorial sea on March 25, 1970.

when the Venezuelan delegate put it forward to the United Nations Deep Seabed Committee in August 1971, as a compromise proposal *de lege ferenda*.²² The concept has been defined by Nelson “as an economic zone not more than 200 miles in breadth from the base line of the territorial sea (the limit of which shall not exceed 12 miles), where there will be freedom of navigation and overflight for the ships and air craft of all nations, but in that zone the coastal State will have an exclusive right to all resources.”²³

A substantial part of the proposal was later incorporated into the Santa Domingo Declaration of June 7 1972, which was adopted by 10 votes to none with 5 abstentions. The States that adopted it are Columbia, Costa Rica, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Trinidad and Tobago and Venezuela. It was provided in the Declaration that “the coastal state has sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, in the seabed and in the subsoil of an area adjacent to the territorial sea called the patrimonial sea.”²⁴ Furthermore, the coastal state has the right to establish the breadth of its TS up to a limit of 12 nm. The Declaration further provides that the coastal state has the duty to regulate and promote the conduct of scientific research as well as the right to adopt necessary measures to prevent marine pollution.

Patrimonial sea is a resource-oriented concept which if adopted would provide States with sovereign rights over the resources found both in the waters, the seabed and sub soil thereof, but it does not confer exclusive sovereignty the like of the TS upon a State. In that zone too, other States would have the right to lay submarine cables and pipelines, including also the right to conduct Marine Scientific Research (MSR).

²² A/AC.138/SR.64

²³ Nelson, *op. cit.*, p. 668; see also, Venezuela’s proposals (A/AC.138/SR64); The Declaration of Santo Domingo, 1972: *New Directions in the Law of the Sea* (1973), vol. 1, at p. 247

²⁴ *New Direction on the Law of the Sea*, *op. cit.*, p. 247

However, while the Declaration was more specific about the breadth of TS, the same cannot be said of the breadth of patrimonial sea, which was decided should be left to an international agreement perhaps of a world wide scope, but that in all cases, it should not exceed 200 miles in breadth. Moreover, the lack of consensus among states claiming TS *stricto sensu* and those claiming it *lato sensu*, which characterized the earlier Declarations still presented itself as a potent factor in preventing the Latin American States from being able to present the concept of patrimonial sea as a unified regional maritime policy for adoption at the third United Nations Conference on the Law of the Sea. This is so because; neither party was ready to abandon its extremism in order to adopt a compromise position, which would in no way have affected the basic principles of their policy. The States claiming TS *stricto sensu*, that is, Ecuador, Panama, Brazil and Peru wanted a 200 mile TS, where passage by ships would be restricted only to innocent passage, while on the other hand, the States claiming TS *lato sensu* - the group, which consists of States, such as Argentina, Chile, El Salvador, Nicaragua and Uruguay, wanted a 200 mile TS that falls within the national sovereignty, complete and exclusive in nature, but upon which ships of all nations would exercise the right of freedom of navigation.

A classic example of the claims in this group is provided by Uruguayan Law 13.833 of December 23, 1969 article 1 of which expressly stated that the sovereignty of Uruguay extended to a zone of "territorial sea of 200 nautical miles." Article 2 on the other hand declared that, "vessels of any state may enjoy the right of innocent passage through the territorial sea of Uruguay in a zone 12 miles wide." Beyond that zone, free navigation and overflight were not affected by the provisions quoted above.

These claims have far reaching effects on the notion of patrimonial sea. The claims of States claiming *stricto sensu* are clearly incompatible with the notion of patrimonial sea, especially as they have the legal implication of making the 200 mile a TS and restricting the passage over it by foreign vessels to that of innocent

passage. It equally implies restrictions on the right of overflight by other states on the zone, because by international law, there is no right of overflight on the TS. Phillips gave the summation of such claims as tantamount to “a claim of territorial sovereignty.”²⁵ Furthermore, acceptance of patrimonial sea as presented infringes the law of the sea as Nelson put it, “in attempting to create a zone beyond a 12 mile territorial sea, where a coastal state is empowered to exercise an exclusive fishery jurisdiction, thus violating a fundamental freedom of the high seas.”²⁶

7.2 The Santiago Declaration of 1952

In furtherance of their desires to extend their maritime control, Chile, Ecuador and Peru met in Santiago and signed a Declaration, which became known as ‘Santiago Declaration’ of August 18, 1952. The relevant aspects of the Declaration are perhaps articles II and V. Article II provides in part that, the Governments of Chile, Ecuador and Peru proclaim a standard of their international maritime policy the exclusive sovereignty and jurisdiction each of them has over the sea that bathes the shores of their respective countries, to a minimum distance of 200 nautical miles. Furthermore, Article V provides, that this Declaration does not signify disregard for the necessary limitations on the exercise of sovereignty and jurisdiction established by international law for the sake of innocent and inoffensive passage through the zone indicated, for vessels of all nations. The Declaration was subsequently ratified by the three states and was acceded to later by Costa Rica on October 9, 1955.²⁷

The maritime policy contained in the Declaration was hinged by the signatories on ensuring for their various peoples access to necessary food supplies and to furnish them with means of developing their economies, as well as to ensure the conservation and protection of natural resources and to regulate the use thereof to the advantage of their countries. However, no matter how well intentioned this

²⁵ Phillips, T.C., “The Exclusive Economic Zone as a Concept in International Law,” vol. 26 (1977) *ICLQ*, p.585 – 586

²⁶ Nelson, op. cit., p. 667 – 8 (Emphasis mine)

²⁷ Ibid., p. 671

policy may appear to be; it did not command the general support of the entire American continent until the late 1960s and early 1970s.

7.3 The influence of the Montevideo and Lima Declarations of 1970

The above was the position of things, when the Latin American states convoked two regional conferences on the law of the sea. The first was the Montevideo conference of 13 March 1970 and the Lima conference of August 1970. The aim of the Montevideo conference was to “exchange points of view and coordinating their position for the diplomatic defence of their respective rights.” Delegates attended the Montevideo Conference from Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru and Uruguay. At the end of that conference, a Declaration, which is generally referred to as the ‘Montevideo Declaration’ was unanimously adopted. The relevant aspects of the Declaration are contained in paragraphs 2 and 6 of the Declaration. Paragraph 2 of the Declaration provides for the recognition of the rights of coastal States to establish maritime limits “in accordance with their geographical and geological characteristics and with factors governing their rational utilization.” Paragraph 6 on the other hand, provides that the right to adopt measures in areas under maritime sovereignty and jurisdiction should be exercised “without prejudice to freedom of navigation by ships and over flying by aircraft of any flag.’

The Montevideo Declaration is important not only because it expressly made provision for freedom of navigation, but also because it clearly revealed the ‘hidden agenda’ of some of the conveners of the conference. This can be highlighted in the statement attached to the Declaration by each delegate to the conference, which clearly revealed the divergence of opinion held by them with regards to the 200-mile claim and the juridical nature of the waters overlain it. In the case of Argentina, Chile and El Salvador for example, the statement attached to the Declaration by each of them indicates that the extension of sovereignty over the maritime zone would in no way impair the freedom of navigation by other States. That is other States would be allowed to exercise unimpeded high seas freedom of navigation.

7.4 Why freedom of navigation was allowed by Montevideo Declaration

Three major reasons can be identified:

- (a) navigation is a time honoured privilege, as such
- (b) navigation causes no loss to anybody, and
- (c) the United States would not have allowed restriction of freedom of navigation for such an extent.

However, the statement attached to the Declaration by each delegate from Brazil, Panama, Peru, Nicaragua and Ecuador, though it mentions freedom of navigation, it is clear from the wordings, that what is meant is a restricted freedom, that is freedom to exercise only the right of innocent passage and not the type of high seas freedom, which has no restriction and which is enjoyed by all nations in the high seas. The statement provides as follows:

- (1) The freedom of navigation mentioned therein in paragraph 6 is the freedom acknowledged in the territorial sea, that is, innocent passage, as Brazilian legislation defines it;
- (2) The reference to over flight does not mean that the rules normally applied to the air space above the territorial sea should be abolished.²⁸

The above view is brought out very clearly in the statement attached to the Declaration by Peru. That statement is particularly interesting, in that, it is based completely on the Santiago Declaration, which states as follows:

The delegation of Peru accepts paragraph 6 of the Declaration of Montevideo on the Law of the Sea with the understanding that the freedom of navigation mentioned is that which is acknowledged in jurisdictional seas, that is, innocent passage, as established in the Declaration of Santiago on the Maritime Zone of (1952); and that the reference to over flight as stated does not imply any derogation whatever of the rules applied to the airspace above

²⁸ Garcia – Amador, F. V., “Latin America and the Law of the Sea”, (1972), *Law of the Sea Institute Occasional Paper* p. 88

the jurisdictional sea, nor of the validity of the provisions of current international agreements on air navigation.²⁹

The attitude displayed by some of the States glaringly showed that they have other rights and interests than pure economic interest to protect and such attitude has far reaching effects in the efforts of the Latin American States to consolidate their positions and claims over maritime extension.

In further efforts to consolidate their maritime policy formulation and claims to maritime extension, 14 Latin American states again converged in Lima in August 1970. At the conclusion of that conference, a Declaration, which is substantially similar to the Montevideo Declaration on the Law of the Sea, was adopted. As a result, the same reservations that attended the Montevideo Declaration were equally made with regards to article 3 of the Lima Declaration; it therefore appears that the much sought policy on the law of the sea was still a long way from being realized by the Latin American countries.

8. The contributions of the African States to the development of the concept of the EEZ

A Kenyan delegate, Mr. F. X. Njenga, first introduced the EEZ concept in 1971, during the Asia – African Legal Consultative Committee (AALCC) meeting in Colombo (Sri Lanka). Apart from the delegates from Asia and Africa, observers attended the meeting from Argentina, Brazil, Ecuador and Peru. A portion of the committee's report on the Law of the Sea indicates *inter alia* that, the Sub-Committee, with the exception of a very few delegations, considered that at the present time any State would be entitled, under international law, to claim a territorial sea of twelve miles from the appropriate baseline and the right to economic exploitation of the resources in waters adjacent to the territorial sea in a zone, the maximum breadth of which should be subject to negotiation.³⁰ In the

²⁹ Ibid, p. 89

³⁰ Report of the Sub-Committee on the Law of the Sea by the Asian-African Legal Consultative Committee, Colombo, 18 – 27 January, 1971

Colombo meeting, the Sub-Committee set up a working group to articulate the above position for further discussions at the thirteenth session of AALCC in 1972.

The concept received a further boost in the resolution adopted by the council of OAU ministers meeting, which took place in Addis Ababa, Ethiopia between 15 and 19 June 1971.

At the 1972 meeting of AALCC therefore, the Kenyan delegate presented a well articulated EEZ concept to the delegations. It defines the important features of the proposed EEZ in terms of the rights and obligations of coastal States in particular and the international community in general. It stated that the underlying reason for the introduction of the concept is because “the present regime of the high seas benefits only the developed countries.”³¹ The Organization of African Unity (OAU now African Union) after series of consultative meetings with member States adopted it and made it the principal objective to be achieved at the Law of the Sea conference in 1974. Within the Asian States too, the concept was widely accepted and endorsed at the Tokyo Legal Consultative Committee meeting of 1974. The resolution affirmed the permanent sovereignty of African countries over natural resources and the inalienable right of all countries, and of African countries in particular, to exercise permanent sovereignty over their natural resources in the interests of their national development and that the exploitation of natural resources in each country should always be conducted in accordance with its national law and regulations.³²

This was followed by a Declaration adopted in Mogadishu (Somalia) in June 1974 by the council of OAU Ministers. The Declaration specifically stated that the African States recognize the right of each coastal State to establish an EEZ beyond its TS, whose limit should not exceed 200-miles measured from the baseline establishing its TS. The Declaration went on to state that in such zone the coastal State should exercise ‘permanent sovereignty’ over all living and mineral resources

³¹ Report of the Thirteenth Session of the Asian-African Legal Consultative Committee, Lagos, 18 – 25 January, 1972

³² OAU Resolution on Fisheries, OAU DOC. CM/Res. 250 (XVII)

and should manage the zone without undue interference with the other legitimate uses of the sea, namely, freedom of navigation, over flight and the laying of submarine cables and pipelines.³³

This Declaration has been seen by a number of commentators as a general departure from the rather rigid and extravagant approach of the earlier Declarations by the Latin American States. Many African States in response to the Declaration enacted legislations on EEZ, even before the concept was formally incorporated in international law. Thus, Nigeria claimed the 200 mile EEZ through Exclusive Economic Zone Act of 1978, as amended by Exclusive Economic Zone (Amendment) Decree 1998, Ivory Coast (Cote D'Ivoire) through Law no. 77 – 929 of 17 November, 1977, Djibouti through Law no. 52/AN'78 Concerning Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, the Maritime Frontiers and Fishing of Djibouti of 9 January, 1979, Kenya through the Presidential Proclamation of February 28, 1979 and Mauritius Maritime Zone Act no. 13 of 3 January 1977.

The Proclamations as major departure from the Declarations did not claim permanent sovereignty over the resources of the zone being envisaged nor did they claim the same over the zone itself as indicated by the Mogadishu Declaration referred to above, but instead they claimed sovereign rights and jurisdiction. In the case of Nigeria for example, the preamble to the Exclusive Economic Zone Act enacted pursuant to the Mogadishu Declaration is instructive on the matter. It provides...Within this Zone, and subject to universally recognized rights of other States (including landlocked States), Nigeria would exercise certain sovereign rights especially in relation to the conservation or exploitation of natural resources (minerals, living species etc) of the seabed, its subsoil and superjacent waters and the right to regulate by law the establishment of artificial structures and installations and marine scientific research, among other things.³⁴

³³ OAU Doc. CM/Res. 289(XIX), contained in UN Doc. A/Conf. 62/33

³⁴ See preamble to the Exclusive Economic Zone Act, No. 28 of 1978, Chapter 116, LFN, 1990.

The scenario of the claims ultimately led to the graduation of EEZ to customary law status, which though independent from the Convention of 1982, the version of it is very similar to the version of EEZ that was adopted at the third United Nations Conference on the Law of the Sea and to a certain extent based on its model. This customary law status of EEZ was recognized by both the United States in a Presidential Proclamation of 1982³⁵ and by the ICJ in *Tunisia vs. Libya case*.³⁶ The zone is of critical importance to coastal States, because its adoption as observed by Nikos Papadakis “would include within national jurisdiction almost 40 per cent of the total area of sea – an area in which most of the known hydrocarbons and commercial fisheries of the sea are found.”³⁷

Furthermore, the impetus received by the concept from the group of 77 and also from the 1977 Algiers summit meeting of the Heads of States of Non – Aligned Countries, paved the way for the adoption of the concept by the third United Nations Conference on the Law of the Sea and the subsequent incorporation of it in the UNCLOS 1982. Thus, Article 55 of UNCLOS provides a specific legal regime for the EEZ and defines the zone as an area beyond and adjacent to the TS, subject to the specific legal regime established in this part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. The provision above raises the question about the juridical nature of the EEZ, that is, whether the zone is a part of the high seas, or whether it possesses a separate legal regime of its own. It is important to determine the true legal or juridical status of the EEZ, since according to V.F. Tsaref:

“The juridical nature of Exclusive Economic Zone constitutes the legal basis which determines the relationship of rights and interests of

³⁵ Presidential Proclamation of 10th March 1982, Vol. 22, ILM (1983), p.461

³⁶ (1982), ICJ Reports, p. 18 at 38, 47 – 49. Similar views were expressed in the Gulf of Maine case, (1984) ICJ Report, 346 at 294; Rego Sanles vs. Ministère Public, 74 ILR, at p. 141 and in the Libya vs. Malta Continental Shelf case, (1985) ICJ Reports, p. 13 at 32 – 4

³⁷ Papadakis N., *The International Legal Regime of Artificial Islands*, A.W. International Publishing Co., The Netherland (1977), p. 54; Brown, E.D. op. cit., n. 1,

the coastal and all other states in the use of the zone.”³⁸

What is the true juridical nature of the EEZ? That is whether the EEZ is to be regarded as forming part of the TS or the High Seas?

III. The juridical nature of the EEZ

1. General comments

The question of the juridical nature of the EEZ emerged among all other new marine concepts deliberated upon at the third United Nations Conference on the Law of the Sea to be the most controversial concept. The controversy arose as Professor Scerni from Italy rightly points out, “the major matter of principle here is to establish whether the EEZ is the high seas, or whether it has a status different from that of the high seas.”³⁹ For example, in an explanation about the right of overflight in the EEZ, Churchill and Lowe have posed a question as follows: In this context, is the EEZ to be regarded as high seas or territorial sea? The learned Professors were of the opinion that UNCLOS “gives no direct answer.”⁴⁰ With due respect the observation by the learned Professors requires further explanation. In the first place, the fact that EEZ is neither the TS nor is it high seas is clearly discernible from the provisions of UNCLOS. Secondly, the observation did not address the fact that the earlier 200 miles claims by the Latin American States were rejected by States because the claims by implication constituted the 200 miles to be TS. If then 200 miles was rejected by States because of its TS implication, it is difficult to see how the same 200 miles EEZ will be TS. Were the nature of EEZ well appreciated, it would be seen that the concept applies strictly to the resources within the water column and apart from the right of jurisdiction which a coastal State possesses over artificial islands and other installations in the zone, the water column retains its high seas character.

³⁸ Brown E.D. and Churchill, R.R. *The Juridical Nature of the Exclusive Economic Zone and the Legal Regime of Navigation of Foreign Vessels Therein, UN Convention on the Law of the Sea; Impact and Implementation*, The Law of the Sea Institute, University of Hawaii, Honolulu (1987) p.591

³⁹ Ibid p. 591

⁴⁰ Churchill R. R., and Lowe A. V., *The Law of the Sea*, Third ed., Manchester University Press (1999), p.173

The controversy that the concept generated among the delegates to the conference was so sharp and the division of opinion created by it so wide, that the provision which was eventually adopted turned out to be a compromise, subject to varying interpretations by States. To place EEZ in its correct legal perspective, there is the need to consider the two main schools of thought on the matter, that is, those who argue that the EEZ has the status of high seas and those who argue for a *sui generis* status for the zone.

2. Does the EEZ possess the same Legal Character as the High Seas?

Those who argued for a high seas character for the EEZ did so based on the traditional division of the sea areas into TS and the high seas. They argued that since the high seas under the 1958 Geneva Convention include “all the parts of the sea which were not included in the TS or in the internal waters of a state”⁴¹ and that since article 55 of UNCLOS defines EEZ as an area beyond and adjacent to the TS, EEZ could only be a part of the high seas and not a part of TS.

Apart from the traditional division of oceans, another most hotly canvassed argument in support of the claim that the EEZ has the juridical status of the high seas is the assertion of the Secretariat of the International Civil Aviation Organization, which according to the proponents of the high seas status of the EEZ re-emphasized the juridical status of EEZ conflicts with that of the high seas. According to the organization:

“For all practical and legal purposes, the status of the airspace above the EEZ and the regime over the EEZ is the same as over the high seas and the coastal states are not granted any precedence or priority. Consequently, for the purposes of Chicago Convention, its Annexes and other air law instruments, the EEZ should be deemed to have the same legal status as the high seas and

⁴¹ Article 1 Geneva Convention on the High Seas, 1958

any reference in these instruments to the high seas should be deemed to encompass the EEZ (emphasis added).”⁴²

The above statement is not completely correct. It is correct to the extent that the airspace above the EEZ is as free as the high seas but incorrect by its assumption that the EEZ has the same legal status with the high seas. For the fact that the quotation by ICAO above uses the word ‘deemed,’ it follows that the organization is not stating conclusively that the EEZ is part of the high seas, it only ‘deems’ it or assumed it in order to satisfy the purpose of the Chicago Convention, its annexes and other air law instruments. The statement is also inconsistent with the provisions of Article 58 of UNCLOS.

In his own argument referred to by Tsarev, Dekanozov pointed out that, even with the divisions of the sea into CZ, CS, fisheries zone and EEZ in UNCLOS, including all the restrictions thereof, the character of the sea area beyond the TS still remains unaffected and that it is subject “to the fundamental principles of non appropriation and common use which constitute the contents of the concept of the high seas’ juridical nature.”⁴³

Furthermore, Tsarev contended that the provisions of article 58 of the UN Convention are in favour of the high seas status of EEZ. He argued in the first place that article 58 makes a vital point that in the EEZ, all States, whether coastal or landlocked, enjoy, subject to the relevant provisions of this convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea

⁴² United Nations Convention on the Law of the Sea – Implications, if any for the application of the Chicago Convention, its Annexes and other international air law instruments, ICAO doc. C-WP/7777 (1984, mimeo.), para. 11. 12. Reproduced as LC/26-WP/ 5-1 (1987, mimeo.) in 3 NILOS YB (1987), 243 at p. 256. See also, Nordquist, M.H., *United Nations Convention on the Law of the Sea, 1982 – A Commentary*, Martinus Nijhoff, The Hague (1995), vol. iii

⁴³ Dekanozov, R.V., “On the juridical nature of the high seas and the sea-bed beyond the limits of the continental shelf,” (1976), *International Law Problems of the World Ocean today*, p.93 – 96. See also, Tsarev; V.F., “The Juridical Nature of the Exclusive Economic Zone and the Legal Regime of Navigation of Foreign Vessels Therein, in *United Nations Convention on the Law of the Sea: Impact and Implementation*: E. D. Brown and R. R. Churchill, p.592

related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of this convention. It is Tsarev's view and conceded opinion that since both the coastal State and other States, including landlocked States enjoy these rights in the EEZ, that the convention intended that the EEZ should be part and parcel of the high seas.

Furthermore, Tsarev has also relied on Article 89 of UNCLOS to argue that the EEZ is part of the high seas. This article prohibits any attempt by any State, whether coastal or land-locked, to subject any part of the high seas to its sovereignty. Tsarev argued that, since no State can validly subject any part of the high seas to its own sovereignty, it follows, that in the language of article 90, every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas. He went further to argue that, on the EEZ all ships sail on the conditions that constitute the regime of navigation in the high seas and as a result, all the freedoms inherent in the high seas, including the well known principles of non appropriation and common use, are all applicable in the EEZ.

Furthermore, the above quotation and the arguments by Tsarev and Dekanozov do not make clear distinction between the waters over laying the EEZ and the resources therein. While the water column of the EEZ, beyond the TS and the airspace above it may no doubt be said to retain the characteristic of the high seas, the same cannot be said of the living and the non-living resources of the water column and of the seabed and subsoil beneath it. It is as will be shown subsequently the failure to make this distinction that has necessitated the confusion over the legal nature of the zone. The EEZ, it must be understood is mainly a resource oriented zone, which must be distinguished from the water column and the airspace above it.

It is equally not true that coastal States are not granted precedence or priority over the EEZ or to draw a conclusive high seas character, simply because other States have the right to lay submarine cables and pipelines on the zone. For one thing, the right to lay submarine cables and pipelines is a compromise based on 100 years of

practice. Over the EEZ, as will be shown shortly Coastal States are in fact granted sovereign rights over the living and the non living resources of the water column, seabed and subsoil and jurisdiction according to Article 60 (1) & (2) over installations, artificial islands and structures. The mention of right over seabed and subsoil of EEZ as seen in Article 56 (1) (a) of UNCLOS arises as a result of similar rights by the coastal State over the CS in accordance with Article 77 (1) & (2). Thus by the combined effects of the two provisions above, the coastal State may be said to possess exclusive rights over the resources of the water column, the seabed and subsoil of the EEZ. The high seas freedom of navigation, which no doubt applies in the zone is still subject to the due regard standard contained in Article 58 (3) and also to the coastal State's right to protect its economic resources.

Not all rights that are exercisable by other States over the EEZ as we are made to believe by Tsarev. Fishery rights, establishment of artificial islands, installations and structures for example cannot be undertaken in the EEZ by other States, except with the prior authorization of the coastal State. Even where the Convention does not attribute a particular right or jurisdiction in the EEZ, either to the coastal or other States, it does not necessarily follow that other States could simply take over the exercise of such rights. In such a situation and especially if the non attribution of rights has generated a dispute, Article 59 of UNCLOS provides *inter alia* that such dispute should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective interests involved to the parties as well as to the international community as a whole. This is indicative of the fact that the EEZ is not as argued by Tsarev a part of the high seas, but a completely new zone with a separate juridical status.

It is submitted that the arguments above failed completely to take cognizance of the provisions in article 55 and Article 86 of UNCLOS. The two articles contain provisions, which if Tsarev had reckoned with them he probably would not have arrived at the conclusion as he did. For example Article 86 provides that, "the provisions of this part apply to all parts of the sea that are not included in the

exclusive economic zone, in the territorial sea or the internal waters of a State, or the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all states in the exclusive economic zone.” From this provision, it is clear that the convention does not intend that the EEZ be subsumed in the juridical character of the high seas. It is equally clear from the provisions in article 55 that the EEZ is beyond but adjacent to the TS, in which case, it is separate from the TS and the high seas.

Another reason why the EEZ must be regarded as having a separate juridical character from the high seas, is because the coastal State is empowered by UNCLOS to exercise a measure of control and to regulate by its domestic laws activities over the high seas freedoms that are exercisable over EEZ, a coastal State does not possess similar right of control over freedom of the high seas beyond the EEZ and the CS. This is why the responsibility for the management of that part of the high seas is vested in the International Sea-Bed Authority in the interest of all mankind unlike in the EEZ where coastal States exercise sovereign and jurisdictional rights over the resources of the sea-bed and subsoil of the CS underlying the zone. Such rights cannot be exercised over the zone by other States except by agreement and consent of the coastal State.

Shigeru Oda had the above in mind when he commented that, “the EEZ has made meaningless the traditional dualism of the territorial sea and the high seas.... the EEZ is a sui generis regime, and the argument as to whether it still remains a part of the high seas seems to be purely academic.”⁴⁴

Thus, by making all the high seas freedoms contained in Articles 87-115 exercisable by all States of the world over the EEZ, article 58 is merely reiterating that the EEZ is a zone which comprises or is an amalgamation of certain freedoms of the high seas, the TS and the CZ including the CS to make up its own separate

⁴⁴ Oda, S., “Fisheries Under the UN Convention on the Law of the Sea,” vol. 77 (1983) , *A.J.I.L.* p. 739

legal status of a *sui generis* kind. The exercise of sovereign rights by coastal States for the purpose of exploration and exploitation of the natural resources of the EEZ should therefore be seen as a necessary limitation in the exercise of the freedoms of navigation etc. in the EEZ, just as the right of innocent passage is a necessary limitation on the exercise of sovereignty of a coastal State over the TS.

In order to substantiate the idea that there is hardly any zone of the sea, that is absolutely subject to the sovereignty of a coastal state, Jennings states:

“But to think of the regime of any part of the seas simply in terms of sovereignty, or the absence of sovereignty, is to lose sight of some important legal facts of the situation. On the one hand there is the very important fact that the territorial sea, which is indeed by definition subject to the exclusive sovereignty of the littoral state, is also subject to the internationally established right of innocent passage. Indeed, according to the Geneva Convention on the Territorial Sea and Contiguous Zone, even those parts of internal waters which result from the enclosure within straight baselines of “areas which previously had been considered as part of the territorial sea or of the high seas,” are also subject to the right of innocent passage...”⁴⁵

In addition to that, paragraph 2 of the same article makes article 88 to 115 and other pertinent rules of international law applicable to the EEZ in so far as they are not incompatible with part V. The provisions of article 88 – 115 are high seas provisions and by making them directly applicable to the EEZ, it is meant to apply strictly to the water column of the EEZ, which has been argued to constitute high seas.

3. EEZ as a *Sui Generis* Zone

This school of thought argues that the EEZ is neither a part of the high seas nor is it that of the TS, but that it is a *sui generis* zone. This proposition was spear-headed and formally introduced for inclusion in the convention to be adopted by Aquilar, who in his introductory note to the second committee stated that, “there is no doubt

⁴⁵ Jennings, *op. cit.*, p.34 et seq., 38

that the EEZ, are neither the high seas, nor the TS. It is a Sui generis zone.⁴⁶ One reason for its being a Sui generis zone is that Article 55 refers to it as being an area, which is beyond but at the same time adjacent to the TS, in which case it is not part of the TS. It is not also part of the high seas, because the zone concerns basically the resources of the water column only, and apart from the rights of jurisdiction over artificial islands, installations and structures, other high seas freedoms are preserved on the water column overlying the EEZ. Thus to understand the sui generis nature of the EEZ, it is important to note from the onset that one of the distinguishing elements of the zone is the fact that it encompasses two areas with different legal implications. That is, on the one hand we have the water column overlaying the EEZ and subject to different legal connotations or regime and on the other hand are the CS underlying the water column of the zone and made up of the seabed and the subsoil thereof. We also have the resources within the water column overlying the zone and it is with respect to the resources and to some extent the artificial islands, installations and structures, which a coastal State is authorized to establish that the zone is constituted.

4. EEZ as Continental Shelf Regime

There is equally the need to acknowledge that the EEZ is not a zone *ab initio* and *ipso jure* like the CS. The ICJ for example attested to the *ab initio* and *ipso jure* nature of the CS in the *North Sea Continental Shelf Judgment* as follows:

the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.⁴⁷

⁴⁶ Aquilar A., "Third United Nations Conference on the Law of the Sea", vol. V, *Official records*, p. 226

⁴⁷ (1969) I.C.J. Reports p.1 at 22, excerpted in (1969) 63, AJ.I.L., p. 591 at 602 and (1969) 8 ILM, p.340 at 347

The immediate implication of the zone not being a zone *ab initio* and *ipso jure* is that the zone is optional and separate from both the high seas and the CS. Article 77(3) of UNCLOS for instance provides that the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. The absence of similar provisions with regards to the EEZ, may no doubt be interpreted to mean that before a State can be entitled to EEZ, such a State has to make a formal claim for it.

Thus, a State needs not make specific claims over the CS; the right exists as an attribute of its sovereignty over the land territory. It is the sovereignty, which a coastal State possesses over the adjacent land territory that initially confers on it the CS rights. Like the CS, the EEZ right is recognized by customary international law as well as under UNCLOS. This position has also been affirmed by the ICJ in the *Libya vs. Malta Continental shelf case*.⁴⁸ The result of this is that a State need not rely on the provisions of UNCLOS and need not be a party to it before declaring an EEZ.⁴⁹

Furthermore, the inclusion of the word “exclusive” is meant to refer only to the sovereign right of the coastal States with regards to fishery and other non-living resources of the water column, but not to navigation. It should also be noted that the TS, the high seas and even the CS regimes had existed long before the evolution of EEZ. It follows therefore, that EEZ as a legal concept arises independently and is not meant to be a part of any of the regimes enumerated above and though there is necessarily bound to be interaction in the exercise of rights in the zones, this arises because of the coexistent nature of the zones with one another. This explains the reason for the rather separate and elaborate but complex negotiations and deliberations that attended the evolution of the EEZ concept.

⁴⁸ (1985) ICJ Reports, p.13 at 33

⁴⁹ Lowe, A.V., Carleton C. and Ward, C., “In the matter of East Timor’s Maritime Boundaries Opinion”, (2002), p.7 in <http://www.petrotimor.com/1g1op.html>

The question that may be asked as a result of the above is whether it is possible to have EEZ, without the CS or vice versa. EEZ and the CS coexist with each other at least to the 200 miles limit of EEZ, but CS may continue beyond that limit depending upon the nature of the coastline of the affected State. Since the rights of a coastal State over its CS is argued to exist *ab initio* and *ipso jure* through sovereignty over the land territory, such rights could be described as inherent rights, the same cannot be argued in favour of EEZ, which must be claimed before a State could have it. Where a State has not made a claim to EEZ rights, it cannot claim it. It can therefore be argued that it is possible to have a CS without EEZ, but not vice versa. The reason for this is because part of the EEZ is CS as per Article 56 (3) of UNCLOS. Commenting on the possibility of existence of EEZ without the CS or the CS without the EEZ, the ICJ noted in the *Libya vs. Malta case* that, although there can be a CS where there is no EEZ, there cannot be an EEZ without corresponding CS.⁵⁰

The question may equally be asked whether a coastal State can restrict its EEZ rights only to the water column. The answer is no, because the EEZ and CS coexist with each other at least to the 200 mile limit of EEZ, the exercise of EEZ rights necessarily implies corresponding exercise of the CS rights. It is for the above reasons that the exercise of a coastal State's rights in the seabed and subsoil underlying the EEZ have been made contingent by article 56(3) of UNCLOS upon the provisions of part VI of the convention, which deals with CS issues. By making the provisions of the CS directly applicable to the EEZ, it is intended to reflect our contention above that the nature of EEZ is *sui generis*, comprising principles from the other maritime zones of the sea. Michael Morris has made similar observations when he pointed out that "the exclusive economic zone includes two areas partially merging though different in their legal regimes."⁵¹ The author was in-fact referring to the superjacent water of the EEZ and the CS.

⁵⁰ (1985) ICJ Reports, p. 13, 33, paragraph 34.

⁵¹ Morris, M.A., "the Military Aspects of the Exclusive Economic Zone," vol. 3 (1982), *Ocean Year Book*, London, p.321

This observation is true if consideration is taken of the fact that in the 1958 Geneva Convention, the concept of CS became incorporated in international law of the sea and by Article 2, coastal States were granted sovereign rights over it and by virtue of Article 5 (4) right of jurisdiction over installations and devices. The sovereign right provided in the above article covers exploration and exploitation of the natural resources of the CS.⁵² However, Article 78(1) of UNCLOS like article 3 of Geneva Convention, provides that, the rights of the coastal States over the CS do not affect the legal status of the superjacent waters or the airspace above those waters. These same principles, including those provided in article 87 of UNCLOS were made applicable to the EEZ with slight modifications. The difference is only that on the superjacent waters of the CS beyond the EEZ, the coastal State does not possess the same legal rights it possessed over the EEZ, in the sense that on the waters of the EEZ, the coastal State possesses sovereign rights to the fisheries and other non-living resources and only required to share the surplus therein with other States through agreements, but apart from this fisheries and non-living resources right, the other freedoms of the high seas apply in the EEZ. The same cannot be said of the CS beyond the EEZ, in which case the fishermen of all nations were free to fish thereon, subject only to the limitations specified under article 1 (1).⁵³

As can be readily ascertained from the provisions in part V of UNCLOS, no text of that part spells out the status of the EEZ as a separate or *sui generis*. Specifically, article 86 excluded it from the provisions of part VII, except as are specifically made to apply to it; such as we have in article 58 (2), which makes the provisions of articles 88 to 115 applicable therein. This is different for example from what obtains with respect to the TS where the entire provision of Article 2 of UNCLOS clearly clarifies its juridical status. Likewise, in the case of the high seas, article 86 mentioned above, clearly distinguishes it by specifically excluding all other zones from the effects of the provisions of Part VII of the convention. This is reinforced by the provisions of article 1 of Geneva Convention on the High Seas, 1958 which

⁵² Article 2 of the Geneva Convention on Continental Shelf, 1958 and article 77 of UNCLOS

⁵³ Geneva Convention on Fishing and Conservation of the Living of the High Seas (1958); See also the provisions of article 116 of the UNCLOS 1982 .

provides that, “the term ‘high seas’ means all parts of the sea that are not included in the territorial sea or in the internal waters of a state.” The above proves conclusively that the EEZ is neither a part of the high seas nor is it a part of the TS. This conclusion receives support from the observation of Brownlie, who noted that, “the exclusive economic zone is not defined in the text as part of the high seas (article 86) and as a result is sui generis.”⁵⁴

The non-conformity of the EEZ to the pattern described above also marked it out as being sui generis in nature. Brown noted that if the general pattern described above had been followed, the EEZ would have been an area of the high seas in which certain rights were accorded to the coastal State by way of exception to the fundamental principle of the freedom of the high seas. He is of the view that, the absence of any reference to the high seas in the definition of EEZ contained in article 55 of UNCLOS with particular emphasis to the words “subject to the specific legal regime established in this part” contained in that article, clearly indicates a departure from the common pattern.⁵⁵

Arguing in favour of sui generis character for the EEZ, Churchill and Lowe, observe that on the basis of articles 55 and 86 of UNCLOS, the EEZ neither has the residual high seas character nor possesses a residual territorial sea character, which would have created a presumption that any activity not falling within the clearly defined rights of non coastal states would come under the jurisdiction of the coastal state. That instead, the EEZ must be regarded as a separate functional zone of a sui generis character situated between the territorial sea and the high seas.⁵⁶ The above statement is true but the inclusion by the learned authors of “a presumption that activities not falling within clearly defined rights of non-coastal States would come under the jurisdiction of the coastal State” requires some explanation. Such activities, especially where dispute has arisen as a result of the non attribution of the

⁵⁴ Brownlie I., *Principles of Public International Law*, (fifth edition), Oxford (1998), p. 206

⁵⁵ Brown, E.D., *The International Law of the Sea*” vol. 1, *Introductory Manual*, Dartmouth (1994), p.216 at 219

⁵⁶ Churchill R.R. and Lowe A.V., vol. 1, op. cit., pp.165 – 166

rights to either the coastal State or non-coastal States are covered by the provisions of Article 59 of UNCLOS. That Article makes equity the basis of resolution of such dispute taking into account all relevant circumstances and the importance of the interest involved to the international community. This proves conclusively that the EEZ is a *sui generis* zone with specific legal regime, which includes the fisheries regime, the regime of navigation and the regime of living and non-living resources of the EEZ.

Furthermore, more clues about the juridical character of EEZ may be found in the definition of *Sui generis* contained in Merriem Webster's Law Dictionary. *Sui generis* is defined by that Dictionary as, "constituting a class alone, unique or particular to it." It follows therefore that, if *sui generis* has been stated to be neither the high seas, nor TS, and the dictionary has defined it as meaning 'constituting a class alone and unique,' the only reasonable inference or conclusion that may be drawn from all the discussions above is that the EEZ constitutes a class of its own and unique in its juridical character, since it is not a part of the high seas nor that of the TS.

The conclusions above leads to the asking of two related questions:

- (1) How is the *sui generic* nature of EEZ reflected by the practice of coastal States, including Nigeria?
- (2) What are its implications on the distribution of the zone's rights?

5. Nature of EEZ as reflected by the practice of coastal States

Evidence abounds in the practice of majority of coastal States to demonstrate that the EEZ is treated as a zone, which is separate and distinct from other maritime zones. In South Africa for example, the Maritime Zones Act of 1994 is instructive on the issue. After section 4 provides for the TS of South Africa, section 7 on the other hand makes provision, which establishes the EEZ. In order to clearly indicate that the EEZ is distinct from the other zones, that Act provides in section 7 that; The Sea beyond the territorial waters referred to in section 4, but within a distance of

two hundred nautical miles from the baselines, shall be the exclusive economic zone of the Republic. In addition to that, section 8 makes a separate provision for the CS, an indication again that the EEZ is distinct from the CS. Thus the description of EEZ as lying beyond the territorial waters and within a distance of two hundred miles from the baseline is meant to indicate that the EEZ is not regarded as a part of the TS and by the inclusion of a separate provision for the CS it is also meant to indicate that the EEZ is recognized to be different from it.

In Canada, Section 4 of the Oceans Act, 1996 establishes the TS, while Section 13 (1) declares the EEZ of Canada to consist of the sea beyond and adjacent to the territorial sea that has its inner limit the outer limit of the territorial sea of Canada and its outer limit: (a) the line every point of which is at a distance of 200 nautical miles from the nearest point of the baselines of the TS of Canada.

Similar practice may also be found in the legislative practice of the Russian Federation. Thus, the Federal Act on the exclusive economic zone of the Russian Federation of 1998, after it provides in Article 1 (1) that the EEZ is a maritime zone which is beyond and adjacent to the TS and with a specific legal regime, that Act goes further in subparagraph (2) and (3) to define both the inner and outer limits of the EEZ, thus successfully separating it from the ambit of all other maritime zones.

The situation is more or less the same in Ghana,⁵⁷ Sao Tome and Principe,⁵⁸ Togo,⁵⁹ Tunisia⁶⁰ and Guinea-Bissau⁶¹ etc. Thus by stating that the EEZ is beyond the TS, yet at the same time adjacent to it, and by defining both the inner and the outer limits of the EEZ, the Canadian and the Russian Federation legislations have clearly

⁵⁷ Maritime Zones (Delimiting) Law 1986

⁵⁸ Law No. 1/98 on delimitation of the territorial sea and the exclusive economic zone, 1998

⁵⁹ Ordinance No. 24 delimiting the Territorial Waters and Creating a Protected Economic Maritime Zone of 16 August 1977

⁶⁰ Act No. 73 – 49 delimiting the territorial waters of 2nd August, 1973, Article 1 of which establishes the territorial sea distinct from the exclusive economic zone established by Act No. 50/2005 of 27 June, 2005 Concerning the Exclusive Economic Zone off the Tunisian Coasts

⁶¹ In Guinea-Bissau, it is Articles 2 and 3 of Act No. 3/85 of May 1985, on the Maritime Boundaries of the State of Guinea Bissau

indicated that the EEZ is a separate and distinct zone. This thus demonstrates recognition by the large majority of coastal States of the EEZ as a separate zone and the fact of its recognition as a separate zone has attained the standard of international customary law.

6. How do the Nigerian laws and maritime practices reflect the sui generis nature of the EEZ?

Giving the arguments of some authors noted above, that the EEZ does not possess a separate zone, an examination of the practice of Nigeria will provide further relevant evidence to debunk such arguments and clear the confusion generated by them. For example, prior to the enactment of the EEZ Act in Nigeria, the Territorial Waters Act, 1978, the Sea Fisheries Act 1971⁶²(repealed) and the Sea Fisheries (Fishing) Regulations of 1972 (repealed) made pursuant to the Fisheries Act all reflected the traditional division of the sea areas into TS and the high seas. Enactment of the EEZ Act of 1978 as a separate Act from the TS Act and the Fisheries Act of 1992,⁶³ which prohibits fishing without licence within the TS and the EEZ of Nigeria may be seen as a recognition by Nigeria of a zone, which is distinct from the TS and by extension the high seas. The above fact is made manifest by the provisions of Section 1 (1) of EEZ Act, which provides as follows: Subject to the other provisions of this Act, there is hereby denominated a zone to be known as the Exclusive Economic Zone of Nigeria (hereinafter referred to as the Exclusive Zone) which shall be an area extending from the external limits of the territorial waters of Nigeria up to a distance of 200 nautical miles from the baselines from which the breadth of the territorial waters of Nigeria is measured.

The description of the zone 'as an area extending from the external limits of the territorial waters' is erroneous, because it gives the impression that the 200 miles EEZ is to be measured from the external limit of the TS, whereas that is not the case. The error is not cured by the provisions of Exclusive Economic Zone (Amendment)

⁶² Chapter 404, LFN, 1990 (now repealed)

⁶³ Section 1 (1), 2 and 3 (1) (a), Chapter S4, No. 71, 1992

Decree 1998, even though the explanatory note to the amendment describes the 200 EEZ as beginning from the baselines of the TS, this is so because the explanatory note has been stated not to form part of the amendment. The error arises as a result of the confusion by the drafters as to where the measurement of the 200 miles EEZ should start from since the 12 miles constitute the TS. This could also have arisen as a result of an attempt by them to distinguish the EEZ from the TS, upon which the drafters of the EEZ Act are aware of Nigeria's sovereignty. Be that as it may, the measurement of the 200 miles EEZ, according to Article 57 of UNCLOS commences from the baselines from which the breadth of the TS is measured but the actual rights over the Zone could be argued to commence from the external limits of the TS seaward to the point of 200 nm EEZ limit. In effect, the real area of the EEZ is 188 nm.

7. Implications of EEZ as sui generis zone on distribution of rights

The sui generis nature of the EEZ has some implications for the distribution of the zone's rights. The rights as provided in UNCLOS include sovereign rights, right of jurisdiction and other rights. The question will be examined in two parts:

- (a) The question of distribution of EEZ rights between a coastal State and other States; and
- (b) The distribution of EEZ rights within a federal coastal State.

7.1 Distribution of EEZ rights between a coastal State and other States

UNCLOS in recognition of the distinctive character of the EEZ makes a separate provision governing exercise of rights over the zone by States. Thus, Article 56 provides as follows:

- (1) In the exclusive economic zone, the coastal State has;
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to;

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

The rights granted by the above provisions can be divided into three main categories – sovereign rights, the right of jurisdiction and other rights. The sovereign right is far less than actual sovereignty, which coastal States exercise over the TS and it is by no means exclusive as the name of the zone may seem to suggest, unlike in the case of CS, where the sovereign right of a coastal State is expressed by Article 77 (2) of UNCLOS to be exclusive in nature. The categorization of the rights as seen in the case of the TS, the CS and also the EEZ is further evidence of the sui generis nature of the EEZ and its implication on distribution of rights between the coastal States and other States. The distribution of the rights will be examined in turn.

7.1.1 Sovereign rights

The sovereign rights conferred on Nigeria as a coastal State over the EEZ is contained in article 56 (1) of UNCLOS. The extension of the rights by that article to the resources of the seabed and subsoil of the EEZ is not to be interpreted as going contrary to the view that it is a distinct zone, but it is still sui generis in nature. The extension as seen in that article can be explained through the provisions of Article 77 (4) of UNCLOS, which confers sovereign rights on coastal States, with respect to the resources of the seabed and subsoil of their CS. CS as noted earlier is a separate zone, notwithstanding, it coexists with the EEZ at least to the 200 miles limit of the EEZ. Therefore sovereign right over the resources of water column of the EEZ necessarily implies sovereign right over the resources of the seabed and subsoil of the CS.

By the combined provisions of Article 56 (1) and Article 77 (4) of UNCLOS, coastal States are empowered to exercise the sovereign rights over the resources within the water column of the EEZ, as well as over the resources of the seabed and subsoil of the CS, which in some cases may extend beyond the 200 mile EEZ. This notwithstanding, differences exist in the exercise of sovereign rights over both the CS and the EEZ. The right over the CS for example is exclusive, whereas, the right over the EEZ is not so exclusive. And whereas, the right over the CS affects the resources of the seabed and the subsoil, that of the EEZ affects both resources of the water column as well as the resources of the CS. In all cases however, exercise of sovereign rights over the CS may not extend beyond 350 nm from the baselines from which the breadth of the TS is measured or shall not exceed 100nm from the 2,500 meter isobaths.⁶⁴

Thus, while a coastal States may exercise full sovereignty (subject to UNCLOS and customary international law) over the TS and all the resources therein to the exclusion of all other States, the sovereign rights granted to coastal States over the EEZ are subject to the qualification that under certain circumstances, other States could be allowed access to the resources. The coastal State is also mandated by Article 56 (2) to have due regard to the rights and duties of other States over the zone. This provision together with those of Article 58 (3) gives both the coastal State and maritime States reciprocal rights over the EEZ. It is also an indication that other States, which are neither maritime nor coastal States, equally possess some elements of rights in the zone. The rights of other States are more specifically enumerated in Article 58. That Article 58 grants all States, including land-locked and geographically disadvantaged States subject to the relevant provisions of the Convention, the freedoms referred to in Article 87, i.e. the freedom of navigation and of over flight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to these freedoms, such as those associated with operation of ships, aircraft and submarine cables and pipelines.

⁶⁴ Article 76 (4) & (5) UNCLOS

In the same vein, since the sovereign right of a coastal State over the CS is exclusive,⁶⁵ it means only the coastal State could harness the resources of that zone, and where other States or organizations will participate in harnessing the resources, this can only be done by the consent of the coastal State usually expressed by an agreement to that effect. Furthermore, where no attribution of right or interest has been made by the convention and there arises a dispute between the interests of the coastal State and any other State, Article 59 makes equity the basis of resolution of such disputes.

It is by virtue of the above provisions that Nigeria derives the authority it is currently exercising over the fishery, installations, artificial islands and structures within the water column of the EEZ and to also explore and exploit the petroleum, gas and other natural resources found on the seabed and in the subsoil of the adjacent CS. Therefore, before the Convention became operative, Nigeria like many other African coastal nations enacted the EEZ Act 1978 and has thereby proclaimed in Section 2 (1) thereof that; "Without prejudice to the Territorial Waters Act, the Petroleum or the Sea Fisheries Act, sovereign and exclusive rights with respect to the exploration and exploitation of the natural resources of the sea-bed, subsoil and superjacent waters of the exclusive economic zone shall vest in the Federal Republic of Nigeria and such rights shall be exercised by the Federal Government or by such Minister or agency as the Government may from time to time designate in that behalf either generally or in any special case."⁶⁶

The claim to sovereign and exclusive rights as seen from the provisions above has been argued to be contrary to the provisions of article 56 (1) (a). The rights referred to in Article 56 (1) (a) are sovereign rights simpliciter and not sovereign and exclusive rights as contained in the provisions of the Nigerian EEZ Act. Similar provisions as Nigeria can be seen in Guinea Bissau. In Article 3 (2) of Act No. 3/85

⁶⁵ Article 77 (2) UNCLOS

⁶⁶ Chapter 116, Laws of the Federation of Nigeria, 1990. This Act has been amended by Exclusive Economic Zone (Amendment) Decree, No. 42 of 1998, which significantly amended section 1 of the main Act

of May, 1985 on the Maritime Boundaries of the State of Guinea Bissau it is provided that, the State of Guinea Bissau shall have the exclusive right to explore and exploit the living and natural resources of the sea and the continental shelf, slopes and seabed within the exclusive economic zone.

However, the reference to sovereign and exclusive right by the Nigerian EEZ Act can be explained in terms of the provisions of article 77(2) of UNCLOS, which, though it is a provision on CS but which has been made applicable to the EEZ by virtue of the provisions of article 56 (3). Article 77 (2) provides that, 'the rights referred to in paragraph 1 are exclusive in the sense that if the coastal state does not explore the continental shelf or exploits its natural resources, no one may undertake these activities without the express consent of the coastal state.' Therefore, going by the assertion that the EEZ coexists or overlapped with the CS at least to the extent of the 200-miles of EEZ and going by the provisions of article 77(2), there is no doubt that the practice of Nigeria in making its right over the exploration and exploitation of the natural resources (especially non-living resources of petroleum and gas found in most cases within the CS) of the EEZ sovereign and exclusive, is justified. In fact, Dahmani argues on this basis that the coastal State's sovereign rights over non-living resources (in the EEZ) are also 'exclusive' and exist *ipso facto*,⁶⁷ subject to the fact that it is qualified exclusiveness.

In addition to that, the provisions of the Act may equally be explained in terms of the country's stance on what it perceives to be the nature of a coastal State's rights over the EEZ. Throughout the deliberations at UNCLOS III, Nigeria has consistently made it clear that it believed the right of exploitation vested on coastal States should be exclusive, but that in the exercise of its sovereign prerogative, it could confer upon other States rights of concurrent or preferential exploitation through bilateral or multilateral agreements.⁶⁸ This policy is reflected in the practice of Nigeria over its EEZ, and can be further explained by the fact that

⁶⁷ Dahmani, M., *The Fisheries Regime of the Exclusive Economic Zone*, Dordrecht, (1987), p. 35

⁶⁸ *Op. cit.*, n. 19, p.139

Nigeria does not have a separate domestic law governing its CS. Thus exclusive and sovereign rights as used in the Nigerian EEZ Act must be seen as a way of emphasizing the nation's exclusive right over the CS.

7.1.2 Rights of jurisdiction

This right is specifically provided for by article 56(1) (b) of UNCLOS. It gives a coastal State jurisdiction over:

- (a) the establishment and use of artificial islands, installations and structures;
- (b) marine scientific research;
- (c) The protection and preservation of the marine environment.

In the real sense, the word jurisdiction carries less weight when compared with the sovereign rights we have referred to and the scope of its operation too becomes vague when used alone without such additions as 'exclusive.' As can be readily ascertained from the provisions of article 56 (1) (a), jurisdiction *simpliciter* is used without such suffix or prefix as 'exclusive,' this means that the jurisdiction referred to is highly limited, especially to installations, artificial islands and structures constructed on the EEZ by the coastal State. This observation is made clearer by the provisions of article 60 (1) and (2). Paragraph 1 for instance, states that the coastal State shall have exclusive right to construct artificial islands, marine research and protection of marine environment and paragraph 2, specifically provided the necessary qualification to the term 'jurisdiction' by stating that the coastal State shall have 'exclusive jurisdiction' over such artificial islands, installations and structures, including jurisdiction with regards to customs, fiscal, health, safety and immigration laws and regulation. However, the right of jurisdiction conferred on coastal States including Nigeria with respect to conduct of MSR in the EEZ is equally subject to the qualification that other States by the permission or authorization of the coastal State could be allowed access to carry out MSR.

It has been alleged that the provisions of the Nigerian EEZ Act is not in conformity with article 56 (1) (b), specifically, section 3 subsection (3) thereof, which restricts

movements of vessels in and out of installations and artificial islands and which imposes a fine of 500.00 Nigerian Naira or twelve months' imprisonment or both on any ship that enters the designated areas of installations, structures and artificial islands without the prior consent or permission of the government has been identified as not conforming to the said article.⁶⁹

The other laws apart from that of Nigeria noted above, listed among the category not in conformity with the Convention as far as navigational rights of other States in the EEZ are concerned include but are not limited to, Maldives and Portugal who accorded to foreign shipping the right, not of freedom of navigation, but of innocent passage,⁷⁰ Guyana,⁷¹ India,⁷² Mauritius,⁷³ Pakistan⁷⁴ and Seychelles,⁷⁵ each of which claims the competence to designate certain areas of its EEZ for resource exploitation: within such areas provisions may be made for entry into and passage through designated area of foreign ships by the establishment of fair ways, sea lanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests' of the coastal State concerned.

To what extent the provisions of the Nigerian law noted above are or are not in conformity with the Convention or may interfere with other rights in the area and what remedy if any has been provided?

By the very nature of the EEZ in encompassing areas which had formerly been part of the high seas, there is naturally bound to be interference one way or the other with other rights and freedoms in the EEZ. The rights and freedoms that are

⁶⁹ Dahmani M., *op. cit.*, n. 66, p. 172

⁷⁰ Act No. 33/77 of 28 May 1977, art.3. UN Legislative Series B/19, p. 93. Article 3 is ambiguous in that it provides, 'establishment of the Exclusive Economic Zone shall take into account the rules of International Law, namely, those concerning innocent passage and over flight.'

⁷¹ Maritime Zones Act, 1977, section 18. UN Legislative Series B/19, p. 33

⁷² Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, section 7(6). UN Legislative series B/19, p. 47

⁷³ Maritime Zones' Act, 1977, section 9.

⁷⁴ Territorial Waters and Maritime Zones Act, 1976, section 6 (4). UN Legislative series B/19, p. 85. See Generally for other states in this category in Churchill R.R. and Lowe, A. V., *op. cit.*, n. 39, pp. 171 - 172

⁷⁵ Maritime Zone's Act, 1977, section 9, UN Legislative Series B/19 p. 102

immediately affected include freedom of navigation, freedom of scientific research and the fishing right of other States. Therefore, the fact that article 56 vests the coastal States with the sovereign rights to explore and exploit the natural resources of the EEZ, and article 60 empowers such coastal States to construct and authorise and regulate the construction, operation and use of artificial islands, installations and structures for the purposes provided for in article 56 and other economic purposes, naturally involves restriction in the exercise of the rights and freedoms of other states including land-locked and geographically disadvantaged states.

The point must be stressed however that, having foreseen the possibility of interference in the exercise by coastal States of the rights herein, the convention provided some safeguards under Article 60. Paragraph 3 thereof provides that the coastal State must give due notice and permanent means of giving warning of their presence. Furthermore, the coastal State must also remove abandoned or disused artificial islands or installations and publish the depth, position and dimension of any such artificial islands and installations. Before establishing or constructing any such artificial islands or installations, the coastal State is enjoined by paragraphs 4 and 5 to first and foremost determine their breadth in line with international standards and in all cases, the dimension should not exceed 500 meters around any such islands and installations and due notice of its existence must also be given. The Nigerian law is in line with this provision in that Section 4 (1) (a) of the EEZ Act designates only 200 meters as opposed to the 500 maximum granted by the provision above and by imposing penalty on the breach by foreign vessels of the designated area, that law still makes allowance for the defence of ignorance of the existence of such designated area. In which case, due publicity of the presence of such artificial islands, installations and structures is envisaged by the drafters of that law.

Lastly, paragraph 7 prohibits the establishment of artificial islands or installations where such will interfere with recognized sea lanes. Further to this, and in an apparent attempt at forestalling delimitation problems that could occur if the

position of the artificial islands, installations and structures is not properly clarified, paragraph 8 provides that artificial islands, installations and structures, including the safety zones around them do not possess a status of their own neither can they generate a territorial sea. Since they do not possess a status of their own, it follows that their presence may not affect delimitation of the TS, the EEZ and the CS. This means that the structures, installations and the artificial islands may not (except with the express agreement of parties) normally be used as special circumstances to alter the line of delimitation between two States.

With all the safeguards in place and with all the articles of the convention that have given express authorization to the coastal States to establish if they so wish, artificial islands, installations and structures it is difficult to see how the section of the Nigerian law under consideration does not conform to the convention. Even the imposition of a fine on the erring foreign vessels, which has been pinpointed as capable of interfering with navigation on the zone, is still in conformity with the convention. Under article 58 (3) of the convention, States are enjoined in the exercise of their rights and duties to have due regard to the rights and duties of the coastal State and to comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this convention and other rules of international law in so far as they are not incompatible with this part. This article empowers coastal States to enact such laws as are necessary for the regulation and protection of their rights in the EEZ. Nowhere in the convention are coastal States specifically prohibited from imposing fines as part of the laws and regulations enacted by them to protect their rights on the EEZ. The imposition of fine as seen in the Nigerian Act above is not out of place in the process of regulating the activities enumerated above.

Imposition of fine may also be subsumed under the provisions of Article 73 (1) & (2) of UNCLOS, which is to the effect that a coastal State in order to explore, exploit, conserve and manage the living resources in the EEZ, is authorized to adopt domestic laws and regulations, including enforcement of such laws and regulations,

which may include arrest and detention of any erring vessel and its crew. Imposition of a fine on vessels entering the designated areas without permission may be seen as one way of enforcing any such laws and regulations enacted by the coastal State and Article 73 has been explained to be “part of a group of provisions of the Convention (articles 61 to 73) which develop in detail the rule in Article 56 as far as sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone”⁷⁶ is concerned.

8. How does the sui generis nature of EEZ affect distribution of the zone’s rights in federal States?

Discussions on distribution of EEZ rights would have been unnecessary in federal States, because the rights mentioned by UNCLOS have been unequivocally granted to States as entities with legal personalities and not to the federating units. However, experience in federal States, such as Nigeria, the United States, Australia, Canada, Pakistan and Sudan calls for an examination of the question. In most of these States, particularly in Nigeria the FCU, especially the coastal inhabitants, do not seem to attach great significance to the nature of the EEZ. Most of them make blanket claims, which do not distinguish between the various maritime zones. As this aspect will be discussed in detail in chapter four, it suffices to state here that there exist a number of reasons why the federating units may not be able successfully to contest the issue of rights over the EEZ and even the CS with the federation.

For instance, the EEZ as well as the CS are concepts, which developed at the times when most of the federating units in the United States, Canada, Australia and even Nigeria have become members of independent sovereign States. The CS concept for example, became an international legal concept in 1945, through the Truman Proclamation of that year and its codification in the Geneva Convention of 1958. The EEZ on the other hand, became an international legal concept on the adoption of UNCLOS by States in 1982. At these times the various federating units were

⁷⁶ The *M/V Saiga* case (Saint Vincent and the Grenadines vs. Republic of Guinea) (No. 1), (1997), para. 66 International Tribunal for the Law of the Sea decision

already integral parts of their respective independent sovereign States. Therefore, since international law governs relations between international persons, such as independent sovereign States and other international organizations, only the sovereign States and such international organizations have the capacity to claim the rights granted by international law. For this reason, Barwick C.J. in the *New South Wales and others vs. the Commonwealth of Australia* commented that: "the sovereignty and sovereign rights of which the Conventions speak are available to Australia as a nation state..."⁷⁷ In so stating, his honour was reiterating the effect of Conventions in international law and the fact that rights mentioned only avail independent sovereign coastal States. The various federating units do not have such legal capacity.

IV. Conclusions

In this chapter, an in-depth examination of the processes of evolution of the concept of EEZ has been undertaken. The explanation is made that its evolution is inextricably linked to the evolution of the concept of CS, brought about by the Truman's proclamations of 1945. The Truman proclamations led to similar proclamations by the Latin American States and also by the Arab States, whose proclamations we argued were extravagant in that they not only claim the resources within the 200 miles areas as in the case of the Truman proclamations, but claimed actual sovereignty over the areas, thereby suppressing the freedoms of the high seas and replacing them in some cases with that of innocent passage. We have seen how the irreconcilable norms of classical international law of the sea and that of the more far reaching maritime claims by some States led to the inability of these States, especially the Latin American States to present patrimonial sea as an acceptable legal concept in place of the extensive TS claims made prior to the convocation of the third UN Conference.

Furthermore, we explored the efforts of the African States in putting forward the idea of the concept of EEZ, and how the concept became widely accepted by other

⁷⁷ (1975) 50 A.L.J.R., 218 at 221

States to the extent that it was described by the ICJ in *Libya vs. Malta*⁷⁸ case as having attained the status of customary international law even before its adoption in the form of a convention. We examined the various postulations and opinion juris on the legal nature of the EEZ and concluded based on the empirical evidence that have been discovered in the process that it has a Sui generis character, meaning that it possesses a separate and unique juridical nature different from the TS, the CS and also the high seas. It is argued that the confusion about the juridical character of the EEZ emanated from the inability or failure by those authors to distinguish between the resources of the water column, which EEZ represented and the water column itself, which is high seas.

Further to that, a review of State practice on the sui generis nature of the EEZ and how the Nigerian domestic laws reflect this character was conducted. The implications of the sui generis nature of EEZ for distribution of rights over the zone were equally examined. The rights because of the unique nature of the EEZ are not necessarily the same as rights over the TS, the CS and even the high seas. Similarly, the rights can only be exercised by independent sovereign coastal States, except where a federal coastal State for example quitclaims parts of its rights to its federating units as seen in the United States or where by constitutional agreement, a federal State accedes to the control of maritime areas and their resources by the federating units as seen in the United Arab Emirates (UAE), or where a State and its special areas enter into special power sharing arrangements as seen in China with respect to Macau and Hong Kong and the case of power sharing between the federal States of Canada and Australia and their coastal units.

⁷⁸ Supra, note 49.

CHAPTER FOUR

4 The crystallisation of problems of title to Nigeria's maritime territory and its resources

I - Introduction: Background perspectives

The entire maritime space of Nigeria is well blessed with abundant living and non-living resources in the form of fishery, hydrocarbon deposit, gas and other mineral resources. Several multinational and national oil and gas companies under the supervision and direction of the Nigerian National Petroleum Corporation (NNPC) are mining the mineral resources. The NNPC it should be noted was established in 1977, through the merger of some departments of the Ministry of Petroleum Resources, and the then Nigerian National Oil Corporation. NNPC is an outfit of the Federal Government of Nigeria charged with the sole responsibility of the upstream and the downstream developments, regulation and supervision of the oil industry on behalf of the Nigerian Government.

The revenue received from the sale of oil and gas alone accounts for well over 80% of Nigeria's wealth therefore, it provides the main stay for the nation's economy. The revenue accruable either from direct sale, petroleum tax or from royalties and rents received from the oil and gas companies operating in the maritime areas or from other maritime activities is collected by the Federal Government and shared among all the federating units and Local Governments in Nigeria in accordance with the percentage recommended by the provisions of the Constitution.¹

In the period between amalgamation in 1914 to the time of federation in 1951, Nigeria was governed as a unitary state. At this time, the question of title to maritime territory and resources did not arise, because there was only one

¹ Section 162 (2) of the Nigerian Constitution, 1999

jurisdiction over the entire land and maritime territories. The problems started soon after federation in 1951 and it is between the Federal Government and the FCU.

This chapter is devoted to examining and exploring the causes of the title problems over Nigeria's maritime territory. It explores the various reasons adduced by both the Federal Government and the FCU, with a view to determining the conformity or otherwise of the claims with international law. In particular, the chapter examines the legality or otherwise of reliance by the FCU on revenue allocation problems, contiguity/native title rights and natural prolongation arguments as basis of wanting to wrest title and ownership of maritime territory and its resources from the Federal Government.

The initiatives of the Federal Government in instituting the *Abia case*² to end the title problems are also examined. In this regard, the chapter undertakes an in-depth examination of the judgement and the ratio decidendi of the case, which was instituted by the Federal Government against the FCU at the climax of the title problems. This is done in order to determine the justice of the case and whether the decision as it presently stands is capable of putting an end to the title problems. The question of rights, obligations and state responsibility under international law, which *inter alia* form part of the ratio decidendi of the case, will be explored as set out below.

II - The basis of the Federal Government's claim

The basis of the controversy centres mainly on problems of title to maritime territory and resources of Nigeria, between the Federal Government and the FCU. On the one hand, the Federal Government asserts its title to the entire maritime territory adjacent to the coast of Nigeria and the resources that it contains, beginning from the baseline delimiting the TS seaward to the limit of the CS of Nigeria. It is the conceded view of the Federal Government that the boundary of each of the FCU ends at the low-water marks along the coast of the country and as a

² Supra

result the FCU have no claim whatsoever to the maritime areas seaward of the low-water mark and the resources found in them.

Hence, the Federal Government claims exclusive legislative, executive and judicial powers over the TS and the right to exercise any of the sovereign and jurisdictional rights exercisable by coastal States over the EEZ and the CS. The Federal Government is of the opinion that natural resources in the TS and the Federal Capital Territory (Abuja) are derived from the territory of the Federation and not from the territory of any of the FCU and that the resources of the EEZ and the CS, fall directly within its sovereign right and jurisdiction, by virtue of their grant to Nigeria by international law. In other words, the Federal Government's contention is that the FCU have no claim whatsoever to the maritime territory seaward of the baselines delineating Nigeria's TS and the resources therein.

The government based its claims on some domestic laws, such as Territorial Waters Act, the Exclusive Economic Zone Act, the Minerals Act, the Petroleum Act and the provisions of the Geneva Convention on the Territorial Sea and on UNCLOS and also on some foreign cases. It suffices to state at this stage that based on our earlier analysis and discussions of the aforementioned domestic laws in the previous chapter, the Federal Government may be said not to have claimed by its domestic laws exactly the rights secured for her by the two Conventions, thus leaving very wide lacunae for the FCU to exploit.

The identified lapses are not enough to deny Nigeria of the rights bestow on her by international law. The provisions in both the Geneva Convention³ and UNCLOS, which spell out the authority and interests in maritime areas all talk of "coastal State" as an entity and not the individual federating units, which do not possess the type of international legal personality envisaged by those provisions. Thus the title

³ Articles 1 and 2 of Geneva Convention on Territorial Sea; Article 2 of Geneva Convention on Continental Shelf, 1958 and Article 2, 56 and 76 of UNCLOS, 1982

and interests of Nigeria in the maritime areas are preserved by international law, the lapses in the domestic laws notwithstanding.

Apart from the coastal States referred to by UNCLOS, autonomous units such as in China with regards to Hong Kong and Macao may equally claim the benefits of UNCLOS, through the special arrangement known as “One country, Two Systems” put in place by the People’s Republic of China in the two autonomous units. In this regard both Macao and Hong Kong are autonomous units within the People’s Republic of China with executive, legislative and independent judicial powers, including that of final adjudication. Both units equally possess some elements of foreign affairs powers subject only to the supremacy of the Central People’s Government’s defence and foreign affairs powers. With regards to ownership of natural resources for example, Article 7 of the Basic Law of the Macao Special Administrative Region adopted by the Peoples Republic of China is instructive on the matter. It provides:

The land and natural resources within Macao Special Administrative Region shall be State property, except for the private land recognised as such according to the laws in force before the establishment of the Macao Special Administrative Region. The Government of the Macao Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals or legal persons for use or development. The revenues derived there from shall be exclusively at the disposal of the government of the Region. Article 8 on the other hand makes the laws, decrees, administrative regulations and other normative acts previously in force in Macao before the creation of the Special Administrative Region to continue to operate to the extent that they don’t contradict the Basic Law.⁴

⁴ Adopted by the Eighth National People’s Congress at its First Session on 31 March, 1993; See http://www.macao99.org.mo/e_doc_fw.html.

Similar provisions have been enacted for the Hong Kong Special Administrative Region also adopted by the Peoples Republic of China.⁵ It can therefore be seen that even though the units mentioned above cannot be said to be independent states in the eye of international law, yet by the special arrangement discussed herein, they have been empowered by Beijing to claim the benefits of UNCLOS. The truth however is that there is no such arrangement as above between the Federal Government and the FCU and as a result the FCU cannot claim such a benefit.

III - The basis of the claims by the FCU

The problems of title to the maritime territory of Nigeria and its resources as far as the FCU are concerned are a reflection of historical problems as well as inaccuracies in the nation's statutory enactments regarding the living and non-living resources of the ocean. In 1951 for example, the Constitution⁶ placed matters relating to living and non living resources, such as mines and mineral resources both on land and in the sea and fisheries including fisheries in rivers, lakes and the TS in the regional legislative list, thus indicating that the Regions could legislate on both living and non-living resources. This position changed with the coming into force of the 1954 constitution,⁷ which placed legislative power over non-living resources in the exclusive legislative list, thereby removing every doubt that might have initially existed as to which of the two tiers of government had legislative powers over non-living resources.

With regards to the living resources of both the rivers, lakes and the sea, the 1954 Constitution was silent, that is, it neither included fisheries in the exclusive, concurrent or in the residuary legislative lists. The gap persisted from this time up to 1963, when the Republican Constitution came into force. As a result, both the Federal Government and the Regions considered it constitutional and expedient to separately enact fisheries legislation. The Federal Parliament for example enacted a

⁵ Article 7 and 8 of the Basic Law of the Hong Kong Special Administrative Region, adopted on 4th April 1990 by the Seventh National People's Congress (NPC) of the Peoples Republic of China. See http://www.info.gov.hk/basic_law/fulltext/content0201.htm.

⁶ The Nigerian (Constitution) Order in Council 1951

⁷ The Nigerian (Constitution) Order in Council, 1954

legislation, which according to its preamble applied only to sea fisheries within the territorial waters of the Federal Territory of Lagos.⁸ Similarly, the Western Region enacted its own fishery law,⁹ which had application only to the territorial waters of that region. Both the Act and Law mentioned above have now been repealed through the promulgation by the Federal Government of the Sea Fisheries Decree of 1971,¹⁰ which is a federal law that applies throughout Nigeria. The power to promulgate the Decree was derived by then military authorities from section 3 (1) of the Constitution (Suspension and Modification) Decree, 1969. This 1971 Decree like the 1954 Constitution referred to above, has now placed legislative power over fisheries in the hands of the Federal Government. The gradual abrogation by the Federal Government of the legislative and power of control which the Regions initially exercised over both living and non-living oceanic resources triggered the first symptoms of the dispute.

The FCU equally raised a number of vital issues, which are discussed in turn below.

Figure Two: A Map showing member states of the Niger Delta Areas of Nigeria



⁸ The Sea Fisheries (Lagos) Act, No. 30 of 1961; Sea Fisheries (Licensing) Regulations 1969, L.S.L.N. 15 of 1969

⁹ Sea Fisheries Law, No 12 of 1965; Sea Fisheries (Motor Fishing Boats Licensing) Regulations, 1967, W.S.L.N. 120 of 1967

¹⁰ Decree No. 30 of 1971.

Source: HAA

1 The revenue allocation and the issue of reduction in the percentage paid to the
FCU

Revenue accruing from either royalties or direct sales of oil and gas products including the resources located on the land territory is shared between the Federal Government on the one hand, the federating units and the various Local Government areas in the country on the other. This was done in accordance with the formula provided, either by the commissions set up to work out acceptable principles of revenue allocation or by the constitutions. For instance, the following percentages of revenue sharing and allocation were at the time stipulated against each commission recommended and paid in Nigeria:

(a) Phillipson S. Administrative and Financial Procedure under the New Constitution: financial Relations between the Government of Nigeria and the Native Administration of 1948 recommended 50 percent to the regions where resources were located; 35 percent to be shared among the other regions, including the region of origin and the remaining 15 percent to the central Government.¹¹

(b) Hicks J.R and S. Phillipson Reports on the Commission on Revenue Allocation of 1951 recommended 50 percent to the region(s) where resources are found, 35 percent to the other regions and 15 percent to the Central Government.¹²

(c) Chicks, A.L. Report of Fiscal Commission of 1954 recommended 100 percent rents and royalties to the regions where the resources were located.¹³

(d) Raisman J. and R.C. Trees Preliminary Report of the Fiscal Commission of 1958 recommended 50 percent derivation, 30 percent to the regions and 20 percent to the central Government.¹⁴

(e) Binn (1964) recommended 50 percent to the region where resource is located.

(f) Under Section 161 (1) of the Nigeria (Constitution) Order in Council, 1954¹⁵ all the proceeds from royalty received in respect of mineral resources, including

¹¹ Lagos: Government Printer.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Legal Notice 102 of 1954

petroleum was paid to the Regions where the mineral resources were extracted. In 1959, through Nigeria (Constitution) (Amendment) Order in Council¹⁶ of that year, 50% of the revenue received from mineral resources, including petroleum was paid to the Regions from where the mineral resources were extracted from. By the Nigeria (Constitution) Order in Council of 1960, the distribution was done in accordance with the provisions of section 134(1) (a) (b), thereof. It provides, there shall be paid by the Federation to each Region a sum equal to fifty percent of –

- (a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region; and
- (b) Any mining rents derived by the Federation during that year from within that Region.

By 1970, the 50% mentioned above had dropped to 45% against the FCU and in favour of the federation.¹⁷

In the following year, the Federal Government promulgated a Decree, which brought to an end the prerogative, which the FCU had received in the sharing of revenue from oil exploration activities. Consequently, by the promulgation of the Off-shore Oil Revenue Decree of 1971, revenue derived from oil exploration and exploitation activities in both the TS and the CS became exclusively reserved for the Federal Government. The Federal Government was not obliged by any law to pay any part thereof into the Distributable Pool, whereby every unit of the federation including the FCU could have a share. The entire revenue from those areas formed part of the Consolidated Revenue Fund administered solely by the Federal Government. The decision to abrogate the former revenue sharing arrangements was informed first and foremost by a desire to avoid repetition of the mistake of the past, whereby problems of revenue sharing contributed in no small measure to the collapse of the civilian administrations between independence up to 1966 and the Nigeria civil war of 1967 to 1971.

¹⁶ Legal Notice 59 of 1959

¹⁷ Constitution (Distributable Pool Account), Decree No. 13 of 1970.

Furthermore, as at the time in question, only five of the twelve federating units in Nigeria were located by the sea side, it was therefore considered to be inequitable to regard the offshore areas as part only of these units and to also accord them with preferential treatment in revenue sharing to the detriment of the other federating units. In addition to that, during the time in question the idea that the offshore areas seaward of the low-water mark is a natural prolongation of the entire land mass of Nigeria and hence belongs to the nation as a whole had gathered enough momentum by the Truman Proclamation of 1945 to support claim of ownership by the Government. The above decision was immensely influenced by the Geneva Conventions of 1958. It was then thought that the offshore areas and the resources thereof would henceforth no longer be regarded as part of the FCU. This again helped in fuelling the disagreement over title to maritime territory and its resources between the Federal Government and the FCU.

At a time the percentage noted above fell to as low as 1% and in 1992 either due to the presentation of the Ogoni Bill of Rights, which sought *inter alia* greater autonomy of the Ogoni people or through several persuasions made to the Federal Government, it was agreed that the 1% should be increased to 3%. It must be stated that the actual payment of the 3% to the FCU remains more of a theoretical issue than reality, this again triggered off more agitation by the Niger Delta people. By 1999, the 3% had risen to 13% by virtue of the provisions of the 1999 Nigerian Constitution, largely due to the relentless agitation by the FCU. The current thirteen percent is paid to each federating unit which has natural resources located within it (both land and sea) in accordance with the provisions of Section 162 (2) of the 1999 constitution. That section provides as follows:

The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, ... Provided, that the principle of derivation shall be constantly reflected in any approved formula as being not less than

thirteen percent of the revenue accruing to the Federation directly from any natural resources.

By virtue of the above, federating units with natural resources located within either their land or maritime territory, particularly the FCU, receive additional thirteen percent shares above others without natural resources. In addition to that, the FCU were also entitled to share equally with other federating units from the 50%, paid into the Distributable Pool Account. The inconsistency noted in the various allocation formulas no doubt sows another seed of discord between the Federal Government and the FCU. The current 13%, which has been argued to have been increased to that percentage perfunctorily by the Federal Government is seen by the FCU as grossly meagre compared with the volume of revenue accruing from oil and gas to the coffers of the Federal Government. As a result, the FCU who had only managed to condone the sharing of revenue derived from the seas they consider belonging to them with the other federating units of the federation found it difficult to swallow the bitter pill of the reduction in the percentage paid to them, hence their agitation to take over total control of the sea and all the resources in the maritime areas of the country.

2. Contiguity/native title dimensions to the dispute

The claim of title to the sea and its resources by the FCU could also be linked to the CS, which the provisions of the Nigeria (Constitution) Order in Council, 1960¹⁸ and the 1963 Republican Constitution of Nigeria both say shall be deemed to be part of the region it is most contiguous to. In this sense, only the seabed and subsoil of the CS was regarded as forming part of the territory of the FCU and not the water column thereof which is beyond the TS. Similarly, the FCU is of the opinion that having been living along the coastline from time immemorial, they possess a native title right over the sea and its resources adjoining to their coasts and that as a result, the Federal Government is estopped from denying a fact, which by its Constitution it alleged to have existed. The veracity of the claims will be examined in turn.

¹⁸ Legal Notice 159 of 1960

2.1 Contiguity

The question of contiguity arose in the first instance from the provisions of both the Independent and Republican Constitutions of Nigeria. In the first instance, section 134 (6) of the 1960 Constitution, provides that, for the purposes of this section the continental shelf of a region shall be deemed to be part of that region. Similar provision as the above is equally contained in Section 140 (6) of the Republican Constitution of 1963. Another Act, which equally speaks of contiguity of CS, is the Off-shore Oil Revenues (Registration of Grants) Act. Section 1 (1) of this Act provides as follows;

All registrable instruments relating to any lease, licence, permit or right issued or granted to any person in respect of the territorial waters and the Continental Shelf of Nigeria shall, notwithstanding anything to the contrary in any enactment, continue to be registrable in the states of the Federation, respectively, which are contiguous to the said territorial waters and the Continental Shelf.¹⁹

The FCU on the basis of the provisions quoted above have consistently argued that the maritime territory adjacent to Nigeria and its resources belong to them and not to the Federal Government as claimed and that the provisions making the CS to be part of the Regions it is most contiguous and making leases, licences and permits to be registrable in states which are contiguous to the TS and CS constitute affirmation by the Federal Government of their claims. It is submitted that this argument cannot be substantiated or supported in all its ramifications. First, the sections of the Constitution being relied upon above are silent on the issue of ownership of the maritime territory. To all intents and purposes therefore, those sections merely 'deem' the CS to be part of the regions it is most contiguous or closest to only for the purposes of that section of the Constitution, which is on revenue allocation and not for any other purposes. Secondly, the word 'deem' as used in the two Constitutions is not specific enough, as to be capable of being interpreted to mean

¹⁹ Chapter 336, LFN, 1990

conclusive evidence by those Constitutions or by the Federal Government of recognition of ownership of the maritime territory and resources by the FCU. To deem as used in the two Constitutions is merely to assume or consider for the purposes of revenue allocation and sharing that the CS is part of the region to which it is most contiguous.

Similarly, registration of leases, licence or permits in states contiguous to the sea could be interpreted as a mere administrative convenience as opposed to conclusive evidence of recognition of the ownership of the sea by the FCU.

2.2 The Native title rights

Closely related to the issue of contiguity is the question of native title rights. The FCU are of the opinion that as traditional occupiers and owners of the adjacent land areas, they as against any other federating units, authorities or persons are possessed of exclusive rights and benefits over the adjacent maritime territory and resources. The veracity of the argument will be examined under the following sub-headings:

- (a) sources and survival of native title rights,
- (b) the exclusivity or otherwise of the rights
- (c) the extent of native title rights.

Arguments will be canvassed in favour of the fact that native title rights are traditional rights, which were not created by the common law as being presently portrayed, but which rights are recognised and preserved by it. In addition, the argument will be made that native title rights as recognised by the common law during the colonial era, survived that era and independence, but are not in anyway exclusive to the holders. Lastly, it will be established through empirical evidence garnered from some statutory provisions and case law, both from Nigeria and other common law jurisdictions that native title rights extend in a limited way to the maritime territory and resources as well.

2.3 Sources and survival of native title rights

In the discussions on the nature of TS in chapter two, mention was made of the various acts of ownership exercised by the various Empires and Kingdoms along the Nigerian coastline before colonisation and formation of the Nigerian State. Recognition of such ownership in the kingdoms and empires led the Europeans, particularly Britain to conclude Treaties of cession with some of the Kingdoms and Empires. The kingdoms and empires that were not directly ceded were forcefully annexed. Similar argument (apart from certain disproportionate purchases of lands from the native Indians and Aboriginal people) could be made in favour of the Native Indians of the United States, the Aborigines of Canada,²⁰ the Maoris of New Zealand²¹ and even the Aborigines of Australia, notwithstanding that the continent of Australia was initially argued but inconclusively to be *terra nullius* or was sparsely populated before the advent of Britain. This contention that the continent of Australia was an empty continent devoid of inhabitants on settlement has been ably debunked by several writings and reports of the very first British residents in Australia. Arthur Phillip for example reported back to England after a visit that, "The natives were more numerous than they were supposed to be."²² Not only was the continent found to be heavily inhabited by the Aborigines, the Aboriginal people were also found to have exercised property rights.²³ As a result native title rights have not been recognised in Australia by treaty as was the case in Canada, Nigeria, United States and New Zealand. Its recognition only came in 1993 through the Native Title Act of that year. A judicial affirmation of the rights was made for the first time by the High Court of Australia in its decision in *Mabo (No. 2)*.²⁴ All these point to the fact that, the territories that today make up the Nigerian State,

²⁰ See for example the Royal Proclamation of 1763, which was the first document that called for land cession negotiations between the British and the Aboriginal peoples and the Quebec Act of 1774 in http://www.canadiana.org/citm/themes/aboriginals3_e.html (visited on 31 October, 2006)

²¹ See the Treaty of Waitangi of 1840 between Britain and the Native Chiefs and Tribes of New Zealand, Article 1 of which talks inter alia of cession "to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or possess over their respective Territories as the sole sovereigns thereof" in <http://www.treatyofwaitangi.govt.nz/treaty> (visited on 31st October, 2006)

²² See letter of Phillip to Nepean, 9 July, 1788, Historical Records of New South Wales, 1 (2):153

²³ Banner, S., "Why Terra Nullius? Anthropology and Property Law in Early Australia," vol. 23, (2005), *Law and Historical Review* p.113

²⁴ (1992)175 CLR, p.1

United States, Canada, New Zealand and Australia were in fact not *terra nullius*, before the advent of Britain and other European countries and were indeed owned and controlled by the traditional occupiers. This is also an indication that native title rights predate the common law in these countries and are thus not created by it.²⁵ The FCU in Nigeria believe that the rights as recognised by the common law survived colonialism and thus independence and that the rights extend to ownership of resources as well.

During the colonial period and as a result of the various treaties of cession, the former ownership and control exercised by the kingdoms and empires in Nigeria passed as a matter of international law to the Crown. The same argument is also valid for Australia, Canada, New Zealand and the United States.²⁶ This passing of title notwithstanding, there is ample evidence in all these countries to show that the passing of ownership and control to the Crown did not extinguish native title rights and interests. In Nigeria for example, native title rights are seen to be preserved by an international treaty. This can be found in Articles XXVI and XXIX of the Anglo – German Agreement of March 11 1913. Article XXVI for instance provides: The fishing rights of the native population of the Bakassi Peninsula in the estuary of the Cross River shall remain as heretofore. Similarly, Article XXIX provides that where the boundary is formed by rivers, the populations of both banks shall have equal rights of navigation and fishing.

Similarly, native title has been held in Australia not to be extinguished by the common law. This is in the case of *Western Australia vs. Commonwealth* where it was held that:

...at common law a change in sovereignty over the territory did not extinguish pre-existing rights and interests. The presumption was that the Crown did not intend to extinguish such rights and interests. As no clear and plain intention by the Crown of a general

²⁵ The majority of the court in *Commonwealth of Australia vs. Yarmirr*, held inter alia that ...native title rights and interests are not created by and do not derive from the common law...(2001) HCA, 56, para. 48

²⁶ *New South Wales vs. Commonwealth* (1975) 135 CLR, 337 at 366 and *Bonser vs. La Macchia* (1969) 122 CLR 177, at 189

extinguishment of native title in Western Australia could be evinced, native title survived colonisation...²⁷

In New Zealand, the Treaty of Waitangi of 1840 is noteworthy. After Article 1 of that Treaty provided for the cession of the territories of New Zealand to the Crown, Article 2 on the other hand:

“Confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess...”²⁸

Since the signing of the Treaty, native title rights have been recognised and preserved by a number of other laws, which include Fishing Protection Act of 1877 (now repealed), the Sea-fisheries Act, 1894 re-enacted as Sea-Fisheries Amendment Act 1903 under which section 77 (2) of the Fisheries Act of 1908 first appeared.

In acknowledging preservation of native title rights by the Treaty of Waitangi, Chapman J commented in *R vs. Symonds* as follows:

in solemnly guaranteeing the native title and in securing what is called the Crown's pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the colony, does not assert, either in doctrine or practice, anything new and untitled.²⁹

Similarly in the *Te Weehi vs. Fisheries Officer*, Williamson J. held on appeal that, “Te Weehi had been exercising a customary Maori fishing right within the meaning of section 88 (2) of the Fisheries Act, 1983,” as a result the charge against Te Weehi was dropped.³⁰ Thus, Williamson J by his acceptance that the customary rights of the Maori, which existed before the surrender of their sovereignty to the Crown in the Treaty of Waitangi in 1840, continue to exist until it is specifically altered by legislation.

²⁷ ILR, vol.112, p. 662 at 664; (1995) 128, ALR, p. 1

²⁸ Op. cit., n. 22

²⁹ (1847) NZPCC, 387 at 390

³⁰ (1986) N.Z.A.R. 144

In Canada, the fact that native title rights are not extinguished by reason of colonialism has been given judicial affirmation in *R vs. Guerin*. In that case the court recognised that the customary rights of aboriginal people were not extinguished by legislation unless that legislation clearly and plainly removed the liberty to enjoy those rights. The court explained the pre-existing rights of the Indian natives as creating enforceable equitable obligation which was “not properly characterised as neither beneficial nor as personal usufructuary but rather as a unique interest which gave the Indians a legal right to occupy and possess the lands although the ultimate title was in the Crown.”³¹ The summation of all the above is that native title rights survived colonialism and independence, notwithstanding the state succession that took place at independence in all the countries referred to above. The rights as gathered from New Zealand and Canadian cases above could be extinguished by legislation clearly enacted by the State for that purpose, but until that is done, the rights survive.

2.4 Exclusivity of Native Title Rights

Are native title rights exclusive to the holders or not? Evidence abounds to show that the common law, which recognises native title rights, recognises them as a form of public rights alone and not as private ones. This may be demonstrated first and foremost by the concept of freedom of the sea, which occupied the jurisprudence of international law and also finds reflection in common law, but this is only to the extent that the public in general have the right to fish and to navigate the seas.³² Evidence of the in exclusivity of native title rights may also be found in the Magna Carta, which enjoined the Crown not to grant exclusive fishery rights to its subjects,³³ and by so doing the public right to fish was protected for future generations. Common law it should be noted could only recognise and protect existing native rights which is not repugnant or contrary to it and since exclusive

³¹ (1984) 13 DLR 321; (1985) 13 DLR, 321 at 323

³² *Gammel vs. Commissioners of Woods and Forests* (1859) 3 Macq 419 (HL); *AG of Canada vs. AG of Quebec* (1902) 1 AC 413 (PC); *New South Wales vs. Commonwealth* (1975) 135 CLR 337, 419, 421 and 423

³³ Statute 25 Edw. 1, 1297

native title rights, especially in the maritime territory is contrary to it, exclusive native title rights could therefore not have been granted by it. In addition, the concept of innocent passage, which is an international customary law concept, prevented the Crown from granting private rights over the TS.

Further evidence may also be found in various jurisdictions to demonstrate that native title rights are not exclusive to the holders alone. Thus in the Australian case of *Mabo No 2 (Mabo vs. Queensland)*, the three islands constituting the Murray Islands brought an action against the state of Queensland and the Commonwealth of Australia seeking legal recognition and protection of traditional land rights which they claimed to possess in and over the Murray Islands in the Torres Straits in accordance with their native rights and customs. They claimed that these rights had existed since time immemorial, surviving the annexation of the Murray Islands to the state of Queensland in 1879. The plaintiffs claimed in their statement of claim that the defendants threatened to infringe these rights and interests by establishing a Council under the Land Act, 1962. By a majority of six to one, it was held *inter alia* that the Meriam people are “entitled as against the whole world to possession, occupation, use and enjoyment of the lands of Murray Islands.”³⁴

The above decision raises the implication that traditional rights over land territory may be exclusive in nature. It has to be noted however, that the decision was arrived at only because the 1985 Queensland Coast Island Declaratory Act (Qld.) was held to be discriminatory against the Meriam people, in that it extinguishes without compensation all traditional legal rights in or over Murray Islands which would otherwise have survived annexation, and it confirms all rights in or over the Murray Islands, which were purportedly disposed of under Crown lands legislation after annexation. The 1985 Act is also held by the court to be inconsistent with Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Sections 9 and 10 of Racial Discrimination Act 1975 (Cth.) enacted by the Commonwealth pursuant to the above mentioned convention and as

³⁴ Supra, p. 217; See also, ILR vol.112, p. 458 et. seq., 460

such could not extinguish the native title rights of the Merriam people. It is worthy of note also that the decision in *Mabo* was reaffirmed in the *Western Australia vs. Commonwealth case*.³⁵

The question to be asked is whether by the above decisions, native title rights are truly exclusive to the holders? Secondly, whether native title rights exist over maritime territory and resources and whether such native title rights are also exclusive to the holders?

By the decision in *Mabo No.2*, the first question above may be answered in the affirmative, that is, native title rights in relation to land territory in Australia are exclusive to the holders. With regards to the second question, the answer is yes native title rights exist in a limited way over the sea and the sea-bed. This is so, because subsequent upon the decisions in *Mabo No. 2 case*, there have been other decisions both in Australia and in other jurisdictions, which established the fact that native title rights exist over the sea and sea-bed, but that such native title rights are not exclusive to the holders alone. Thus in the *Commonwealth of Australia vs. Yarmirr*, the Federal Court of Australia determines that native title exists in relation to the sea and sea-bed within an area described in the determination, but that native title rights and interests “do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others.”³⁶

An appeal was lodged against the decision by both the Commonwealth and the claimant to the Full Court of the Federal Court,³⁷ which reversed the decision of the Federal Court, but by special leave, a further appeal was made to the High Court of Australia. The High Court dismissed the appeal by both parties, while at the same time upholding the decision of the Federal Court to the effect that, “native title could and did exist over the sea. Native title did not however confer exclusive

³⁵ *Supra*, n. 28, pp. 662 - 664

³⁶ ILR (Lauterpacht and Greenwood), vol. 125 p. 321 at 322

³⁷ *Ibid.*

possession, occupation, use and enjoyment of the sea.”³⁸ The court after an exhaustive examination of precedents from both the United States and Canada explains further that its decision in the case is informed by “a recognition of the reality of the difference between the land mass and the seas and the overarching importance of the sea, for national defence, foreign relations, strategy, diplomacy and related treaty, trade and commercial considerations.”

It is not only in Australia that native rights in the offshore areas have been held not to be exclusive, similar holding has been made in other common law countries. In New Zealand for example, in the case of *Waipapakura vs. Hempton*, Stout J held that “there is no attempt in the Fisheries Act, 1908, to give rights to non-Maoris not given to Maoris. All have the right to fish in the sea and in tidal rivers who obey the regulations and restrictions of the Statute...”³⁹

In Canada it is in the case of *Gladstone vs. R*, where the question for determination before the Supreme Court was the interpretation of section 35 (1) of the Canadian Constitution Act of 1981. That section recognises and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. However, the court refused to accept any construction of the above mentioned section, which would have the effect of extinguishing the ancient common law rights to fish in tidal waters. Specifically, the court stated, “it was surely not intended that by the enactment of section 35(1), the common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially.”⁴⁰

In the United States, common law was not the only basis of denial of exclusive native rights in the maritime areas as seen in the case of Australia and Canada. Other bases include history, public policy and the paramount doctrine, by which the Federal Government’s rights are held by the Supreme Court in the Tide Land cases to be paramount over those of the American states. Similar holdings in the United

³⁸ Ibid, pp. 323, 466, para. 384

³⁹ (1914) 33 NZLR 1065

⁴⁰ (1996) 137 DLR (4th) 648 at 679

States can also be found in the decisions in *Shively vs. Bowlby*; *Te-Hit Ton vs. US*; *Inupiat Community of the Arctic Slope vs. United States* and the *Native Village of Eyak vs. Trawler Diane Marie Inc.* In the *Shively's case* for example, the Supreme Court of United States was of the view that:

the Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways: and being chiefly valuable for the public purposes of commerce, navigation, and fishery, shall not be granted away...⁴¹

Thus in *Te-Hit-Ton Indians vs. US*, the United States Court of Claims followed the decision of the Supreme Court in *Shively's case* in determining that the Alaskan Indian clan who sought to claim compensation from the United States Government for authorising the taking of salmon from the areas considered to be part of where the clan had earlier acquired and for closing some of the plaintiff's ancestral fishing grounds could not succeed. The Court of Claims rejected the plaintiff's claims on the basis that no such grant of an exclusive fishery could be presumed as it was contrary to the policy of the government to make such grants.⁴²

In the *Inupiat Community case* for example, the matter for determination by the court was a request made by the claimants for a declaration that the claimants possessed sovereign rights and un-extinguished aboriginal title to an area which lies between 3 and 65 miles off the coast of Alaska. The claims above were rejected at the court of first instance and on appeal to the Ninth Circuit Court of Appeals it was held that, to uphold the claim "would be to ignore the underlying principle upon which the Supreme Court has

⁴¹ 152 US 1.

⁴² (1955) 132 F Supp. 695

placed reliance, that federal supremacy over the adjacent seas is an essential element of national sovereignty.”⁴³ Fitzgerald J observes in that case as follows:

If as a matter of constitutional law, the federal government must be possessed of paramount rights in offshore waters, it makes no difference whether competing domestic claimant is a state or a tribe of American natives. All are subordinate to the federal government and neither can, under the constitution, claim rights which are at odds with those which are of necessity entrusted to the one external sovereign recognized by the constitution.⁴⁴

Lastly, in the *Eyak case*, the court repeated the holdings in the *Inupiat Community case*.⁴⁵

2.5 Extent of Native Title Rights

Having determined that native title rights survived colonialism and independence and that the rights, are exclusive over land territory and in-exclusive over the maritime territory, the task here is to determine the contents and the spatial extent of the rights. The starting point according to Griffith QC is to note that native title rights, whether over land or maritime territories “do not have a fixed or definite contents. They consist according to him of “a bundle of rights, which are defined by the customary laws of a particular community. The content of that bundle of rights may vary from a right to hunt or to hold ceremonies or to the kind of rights which the Australian High Court in the *Mabo No.2 case* mentioned above held the Meriam people to possess as against the whole world.”⁴⁶ That is the right of possession, occupation, use and enjoyment of the lands of Murray Islands.

With regards to maritime territory, the Court in the *Commonwealth of Australia vs. Yarmirr*, gave a graphic example of the nature and components of native title rights.

⁴³ (1982) 548 F Supp 182, at 185 (District of Alaska)

⁴⁴ Ibid

⁴⁵ 154 F 3d 1090 (Ninth Circuit (1998) at 1096

⁴⁶ Griffith G., “Offshore Cartography” in <http://www.mlaanz.org/docs/98journal2a.html>

According to that Court, native title rights include the right to travel through the areas, to fish and hunt in them for the various purposes stated and to visit areas of cultural and spiritual importance. These rights the court says are not exclusive and as such, “the non exclusivity necessarily involves a number of different elements: that anyone else might at anytime and any place within the relevant area does what the claimants non-exclusively did or do there.” The rights have also been held in *R vs. Sparrow*⁴⁷ and *Mason vs. Tritton*⁴⁸ to extend to fishing.

As could be observed from the cases cited above, native title rights have been held in Canada, the United States and New Zealand to apply in most of the cases to fishery and navigation. Similarly in Nigeria, the Anglo-German Treaty referred to above apply to right over fishery and navigation. This is so because fishing and navigation are rights which existed prior to colonisation in the countries above and as the common law could only recognise the rights that were in existence before its introduction in a country, fishing and navigation rights are the rights mostly recognised by the common law. This contention necessarily implies that as petroleum, gas and other oceanic mineral resources were not yet discovered in most of these countries, including Nigeria prior to colonisation, native title rights may not extend to them.

With regards to the area of the sea covered by native title rights, the argument has been made earlier that Britain adopted the three-mile TS limit and that that concept was introduced by it to most of its colonies and protectorates. The argument was equally made that the three mile TS formed part of the national territory of the adjacent State. This been the case, it follows that the spatial limit upon which native title rights could be legally exercised was the three-mile TS referred to in chapter two. In addition, the natives like any other person could fish and navigate on the waters beyond the TS, but this could not be on the basis of exercise of any native

⁴⁷ (1990)1 SCR 1075

⁴⁸ (1994) 34 NSWLR 572

rights, but that of the freedom of the high seas, which operated in the high seas beyond the three-mile sea TS.

3 The natural prolongation argument

The issue of natural prolongation forms the core of the dispute between the Federal Government and the FCU, particularly the Niger Delta areas. Article 76 of UNCLOS defines CS as follows;

the Continental Shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

Similarly, the ICJ has described CS rights in the *North Sea Continental Shelf cases* as rights, which existed *ipso facto* and *ab initio* and by virtue of sovereignty over the land.⁴⁹ The provision above and the ICJ’s description in the above mentioned case are being consistently confused, misconstrued and misinterpreted (sometimes by very eminent writers) to refer to the land territory of the FCU and the fact that their rights over it existed from time immemorial. Such misinterpretation has influenced in no small measure the current erroneous assertion of title over the maritime territory and its resources by the FCU. In this regard, it is pertinent to refer to Professor Sagay’s widely reported statement that:

“All over the world, ownership of resources belongs to the people where they are located. When these oil communities are located in the coastal area, their right of ownership extends to the outer limit of the continental shelf. The 1958 Convention on the continental shelf, the 1960 Constitution of Nigeria, section 140, 1982 Convention of the law of the sea section (sic.) 76 is international and local authorities to support my position.”⁵⁰

⁴⁹ (1969) ICJ Reports, p. 3

⁵⁰ Nigerian Guardian Newspaper of 17th March, 2005, www.guardiannewsngr.com/news/article06

Ikhariale after affirming the correctness of Sagay's comments on the judgment of the Supreme Court in *Abia case* observes as follows:

"It failed to fully make use of the correct portion of the Law of the Seas, namely the regime of the Continental Shelf, which unequivocally treats the continental shelf as a natural projection of the inland territory, extending on a very well defined gradient, into the sea. This would have saved the revered justices from tortuous mental gymnastics that they had to go into in determining the proper connection between the so-called "littoral states" and all activities on their territorial waters."⁵¹

Lady Ime Udom, the Akwa-Ibom state delegate to the political debate earlier mentioned has taken the argument a step further by introducing an element of secession of Akwa-Ibom. She argued:

"International law acknowledges that the continental shelf is a natural elongation of the littoral state contiguous to it. So, you tell me if Akwa-Ibom as a littoral state cannot claim the continental shelf that is the natural elongation of its own land, if today Akwa-Ibom decides to secede and go, will Nigeria have that continental shelf". While replying to a critique, lady Udom has said, "He (referring to Senator Uba Ahmed) claims that every law made in Nigeria has to be superseded by international law? That our constitution that is the supreme law of the land is to be superseded by international treaties? So where is our sovereignty?"⁵²

The statements above represent gross misconception of the basic purports and tenets of the provisions of the 1960 Constitution and article 76 of UNCLOS cited by the learned Professor. In the first place, the provisions of both the Geneva Conventions and UNCLOS are commonly referred to and cited as articles and not sections as we

⁵¹ Ikhariale, M., "Resource Control Judgment: Who to Blame" of 10th January, 2005 in <http://www.dawodu.com/ikhriai11.htm>.

⁵² Vanguard Newspaper of 5th May, 2005 in http://www.vanguardngr.com/articles/2002/niger_delta/nd304052005.html (emphasis added).

are made to believe by the eminent professor. Again, the reference in both the Geneva Convention and article 76 of UNCLOS mentioned by Sagay is to State as an entity and not to communities as the learned Professor has observed. Thus Chief Gani Fawehinmi, rightly observed that "state here means Nation State and not a geographical or political division within the Nation State, like Bayelsa State. The Customary International Law recognises Nation States and not a geographic or political division within a National State..."⁵³ This is not to say however that international law will reject any arrangements made by Nigeria or any coastal State whatsoever by which the coastal units are given certain specified rights over resources of the seas. Thus if Nigeria by special arrangements (as seen in the UAE, Hong Kong and Macau in China, the quitclaiming made by the United States to some of its coastal units) conferred certain specified rights or grants some concessions to the FCU over the resources of certain segments of the maritime space, international law would accept it as an internal arrangement, even then, it will always be the State to which UNCLOS addresses as having the rights and the obligations. The only way to give for example Hong Kong and Macau or the communities along the coast in Nigeria direct rights and obligations in UNCLOS is to give them the right to accede to it. Until such arrangements are made, the reference by UNCLOS will continue to be to Nigeria as an independent sovereign coastal State.

Certain States like the United States, Canada and Australia have either quitclaimed or entered into joint ownership and management agreement of either a part of their seas or in the case of Canada joint management of the entire sea areas within Canadian national jurisdiction with their federating units, but not to the individual communities along the coast and this was done on the basis of different considerations as opposed to judicial interpretation. The judicial decisions, which preceded the quitclaiming in the case of United States (as would be further shown in chapter five) awarded ownership and control of maritime territory to the Federal

⁵³ Nigerian Guardian Newspaper of 18th October, 2005 in <http://www.guardiannewsngr.com/law/article03>.

Government just like the judgment of the Supreme Court of Nigeria awarded ownership and control of maritime territory adjacent to Nigeria to the Federal Government. This led to the criticism by Sagay and Ikhariale.

To cap it all, no coastal State has the right of ownership or sovereignty over the CS beyond the TS not to talk of individual communities. The highest right a coastal State could exercise with regards to the CS beyond the limit of TS is that of sovereign right and jurisdiction. The sovereign right in question affects the resources of the CS while the jurisdiction is with respect to installations and artificial islands but not the water column overlying it. However, with the emergence of the EEZ concept in 1982, coastal States can now exercise sovereign right over the resources of the water column and jurisdiction over installations and artificial islands. The exercise of the rights themselves is an attribute of sovereign independent coastal States and not that of the individual communities or federating units along the coast. The above argument equally applies to the comments of Ikhariale noted above. The 1960 Constitution mentioned by Sagay merely deemed the CS to be part of the states most contiguous to it but this is only for the purpose of revenue allocation and nothing more.

Evidence abounds to support the view that the CS of a coastal State, including Nigeria is not a natural prolongation of the land territory of the communities bordering the sea alone, but that of the entire land mass of the coastal State. Apart from the portions of Geneva Convention and UNCLOS cited above, Truman's proclamation, which is often regarded as the first national claim to CS stated that "the Government of the United State regards the natural resources of the subsoil and seabed of the CS beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."⁵⁴ Though the proclamation itself does not specify the geographical limit of the CS being claimed but the press release attached to it stated that the CS was considered

⁵⁴ Proclamation No. 2667, Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and the Seabed of the Continental Shelf (emphasis added). Reproduced in the Code of Federal Regulations 1943 – 1948 Comp., 3, at p. 67

as extending to a water depth of 100 fathoms, which is equal to 600 feet or 200 meters.⁵⁵ This open-ended definition of CS was adopted by the Geneva Convention on Continental shelf of 1958.

The proclamation has greatly influenced the evolution of international customary law on the subject and it formally found its way into the corpus of international law in the 1958 Geneva Convention on Continental Shelf. In the light of this, Article 1 of the 1958 Geneva Convention defines CS as the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of TS, thus employing the concept of adjacency rather than natural prolongation adopted by the 1982 UNCLOS. The reference again under article 2 of the same Convention is to coastal State as opposed to units or communities along the coast. This no doubt is a reflection of the State practice, which developed as a result of the proclamation by which the South American States of Chile, Ecuador and Peru, which have very small CS in the physical sense, claimed full sovereignty over a 200 miles distance from their coasts. Though the claims were met by the oppositions of other States, nevertheless other States such as the Mid -Eastern States followed the practice by claiming CS rights over the seas adjacent to their coasts. A large number of the claims were made by the States as entities and not by the individual communities within those States.

Thus, the 1958 Geneva Convention on CS has been described by the ICJ in the *North Sea Continental Shelf cases* as having crystallised the customary doctrine by which the outer limits of the Continental Shelf were defined by reference to the physical extension of the land mass below the adjacent sea and the depth to which it was possible to exploit the resources of the continental shelf.⁵⁶ The Truman proclamation together with similar proclamations by other States, which it inspired, including the *North Sea Continental Shelf case* mentioned above, all refer to coastal

⁵⁵ The Public Papers of the Presidents of the United States: Harry Truman (1945) p. 353 (1969). See also, Hollick, A.L., "US Oceans Policy: The Truman Proclamation", vol. 17 (1976 – 7), *Virginia Journal of International Law*, pp. 23 – 35.

⁵⁶ *Supra*, n. 50, p. 3

States as entities and not to the individual federating units in Federal States or to communities along the coast.

Furthermore, the description of the rights as seen above by the ICJ in the *North Sea Continental Shelf cases* as existing “*ipso facto* and *ab initio*”⁵⁷ raises certain fundamental questions: What time in history does *ab initio* refer? Does it mean going back into history or does it start to count from the date of statehood? It is reasonable to argue that *ipso facto* and *ab initio* as used by the court can only refer to 1945, which is the time that the doctrine first emerged at the international plane. For Nigeria *ab initio* can only refer to 1960, because that was the date Nigeria became a full-fledged sovereign State that could claim rights under international law. Furthermore, by the doctrine of inter temporal law as enunciated in the *Island of Palmas case*,⁵⁸ it is the law that existed at a particular time that governed the events of that time and as the concept of CS did not exist at the international plane until 1945, the ICJ could not be referring to a time earlier than that. This probably explains the reason for the decision of the arbitrator in *Petroleum Development Ltd vs. Sheikh of Abu Dhabi*, to the effect that the “grant of a mineral concession in 1939 was not to be understood as including the continental shelf,” because that concept was not in existence as at that time.⁵⁹ Again, it can be rightly argued that it is the entire land mass of a country that is envisaged by both the Geneva Convention and UNCLOS not the land mass of the individual federating units of a nation. It is therefore difficult for the FCU or the Niger Delta people to sustain a claim of title to the maritime territory and resources adjacent to Nigeria on the basis of the natural prolongation principle alone.

As noted above, lady Udom’s statements as a lawyer and the delegate of Akwa-Ibom state to the political debate raise the following issues:

⁵⁷ Ibid

⁵⁸ (1928) 2 U.N. Rep. 829; 4 ILR (1927 – 28) 153

⁵⁹ Supra, p. 144 at 152

- (1) The statement equates littoral state with the federating unit of Akwa-Ibom state, thereby wrongly attributing to it the rights granted by international law to sovereign coastal States over the CS.
- (2) The statement that international law cannot supersede Nigerian laws, especially the Constitution, which she regards as the supreme law of Nigeria is partly correct and partly incorrect.
- (3) Most importantly, the statement raises the question of secession.

With respect to item one above, the word 'littoral state' is commonly used to refer to sovereign independent coastal States and not to the units of a federation. It would be recalled that the Supreme Court in *Abia case*⁶⁰ used similar words throughout its judgment in that case to refer to the FCU. This is erroneous, the reference to coastal States by UNCLOS as the rightful authority to exercise the rights granted by it is not a reference to the units of a federation which do not possess the legal capacity the type envisaged by UNCLOS. Nigeria alone by reason *inter alia* of its status as an independent sovereign State under international law and by reason of the fact that it is a party to UNCLOS, coupled with its power over foreign affairs matters in the Constitution under which it's CS is categorised has the power to claim the rights granted by UNCLOS. It should be remembered also that the words "coastal States" are used by UNCLOS as a way of distinguishing between them and third States.

The eminent lawyer must be taken on item two above not to have evinced the degree of concern that would indicate her awareness of the impact of international law on domestic legislation or demonstrated in her comments the degree of versatility which would indicate her appreciation of the principles of international law involved here. Although Nigeria may be termed a dualist State, in which case international law and domestic laws are regarded as separate. The question is: If international law and domestic laws are separate as conceived by the dualist theory, which between the two legal systems will be regarded as being superior to the other in case of a conflict between them? In the assessment of the lady lawyer, the

⁶⁰ Supra

Nigerian domestic law, particularly the Constitution is superior to international law. This may be true to the extent that Nigeria is a dualist State and to the extent that the debate between positivism or dualism and monist theories on the relationship between international and domestic laws is very controversial and difficult to reconcile.

However, the lady lawyer's statement may be disputed in many respects. First and as will be shown subsequently, the dualist approach which she relies on is difficult to reconcile with the practice and the jurisprudence of the International Court and to a conventional law on the matter. For example, the Permanent Court of Arbitration has held in the *Free Zone case*, that "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations."⁶¹ In the *Land and Maritime Boundary case (Cameroun vs. Nigeria: with Equatorial Guinea intervening)*, Judge Mbaye of the ICJ made a similar observation as above, when Nigeria attempted to plead the non ratification by the then Supreme Military Council of Nigeria of the Marua Agreement of 1975, which ceded Bakassi Peninsula to Cameroun as a reason for avoiding that Agreement.⁶² Further more, Article 27 of the Vienna Convention on the law of Treaties 1969, is in tandem with the decisions above. It provides that a party may not invoke the provisions of its internal laws as justification for its failure to perform a treaty. The above clearly demonstrates that international law may be held to be superior to the domestic law in certain circumstances.

Secondly, it would appear that where a State had appended its signature on an international document or treaty and had delivered the instrument of ratification thereof, where required, it becomes a matter of international conventional law for it, which it has to respect and observe. By doing the above Nigeria had by that singular action subjected itself and its activities to be bound by UNCLOS. To do otherwise

⁶¹ PCIJ, series A/B, No. 46, at p. 167

⁶² (2002), ICJ

would not only offend against the established rule of *pacta sunt servanda*, but would impose international responsibility on Nigeria.⁶³

Thirdly, majority of the provisions of UNCLOS have attained the status of customary international law. That being the case, the Nigeria's domestic law may not override it.

Fourthly, the monist theory, which is based on natural law thinking and the idea of a world society and which Kelsen⁶⁴ argued makes international law to be superior to domestic law, appears to reflect a more pragmatic and practical reality of the debate more than the dualist approach. Thus, the constitutions of countries like Germany,⁶⁵ United States of America⁶⁶ and others, the general rules of international law are incorporated as integral part of the constitution and express provisions made to the effect that such general rules of international law override and directly establish rights and obligations for the inhabitants of the federal territory.

Fifthly, the eminent lawyer must be taken not to have addressed her mind to the provisions of the Constitution of Nigeria, which declares Nigeria's foreign policy objectives to include respect for international law and treaty obligations.⁶⁷ It thus appears, that Nigeria by her ratification of UNCLOS and the incorporation of the provisions of it in the domestic law has by that singular action acknowledged her subjection to be bound by the provisions thereof and cannot again plead the domestic laws, including the constitution for failure to perform the obligations imposed or claim the rights granted by it.⁶⁸

⁶³ Article 26, Vienna Convention on the Law of Treaties, 1969

⁶⁴ Kelsen H., *Principles of International Law*, 2nd edition, (1966) (Tucker edition), New York, 553 - 588

⁶⁵ Article 25 of the Basic Law of the Federal Republic of Germany, 1949 as amended up to and including 20 December, 1993

⁶⁶ Article VI, makes all Treaties made or which shall be made under the authority of the US to be the Supreme Law of the land

⁶⁷ Section 19 (d), Constitution of Nigeria, 1999

⁶⁸ See Article 27 of the Vienna Convention on the Law of Treaties, 1969.

Lastly, on the issue of secession, Lady Udom could be taken to be stating what is obvious, by ruling that on secession of Akwa-Ibom from the federation of Nigeria the CS which is adjacent to it, would cease to part of Nigeria. Barwick C.J. made a similar comment in the *State of New South Wales vs. the Commonwealth of Australia*, that “upon a territory being given its independence of Australia and ceasing to be a dependent territory, the marginal seas become, by virtue of that very independent national status, the territorial seas of the new nation State.”⁶⁹

A practical example of the situation under consideration is offered by the secession of Eritrea from Ethiopia and the disintegration of the former Federal Republic of Yugoslavia. At the time Eritrea was a component province of Ethiopia, the maritime areas were part of Ethiopia, but after Eritrea had staged a successful secession from it, the maritime areas ceased to be part of Ethiopia and Ethiopia has been rendered a landlocked State as a result. Thus if Akwa -Ibom successfully seceded from the Nigerian State it would no doubt go away with the segment of the CS adjacent to it as argued, but this is only by virtue of its newly acquired status as an independent and sovereign State. As long as it continues to be a unit under the federation of Nigeria, the sovereignty over the TS and sovereign rights over the CS would continue to belong to and exercised by the Nigerian State and not by Akwa-Ibom or any other units of the federation. As would be explained when considering right of self determination, secession has some legal implications not foreseen by Lady Udom. Thus, if a segment of an independent sovereign State attempts to break away by the use of force or by any other means short of an agreement to that effect, it becomes a matter for the protection of territorial integrity and political independence of the parent State, which under international law the parent State will be entitled to defend and prevent the breaking away through all possible means.⁷⁰

⁶⁹ (1976) 50, A.L.J.R. p.223

⁷⁰ Article 51 of the UN Charter, 1945

IV. Institution of the *Abia case* in Court

1. Facts/judgment of the case

The title problems over the sea and its resources in Nigeria reached a climax in February, 2001, when the then Attorney General of the Federation instituted an action against the 36 federating units (but in the main the FCU championed the entire course of the trial of the case because they are the ones that would be most affected by its outcome) at the Supreme Court, invoking the original jurisdiction of that court in the determination by it of the “seaward boundary of a ‘littoral state’ within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that state pursuant to the proviso to section 162 (2) of the Constitution of the Federal Republic of Nigeria, 1999.”⁷¹

The Federal Government contended that the southern boundary of the FCU is the low-water mark or the seaward limit of the inland waters. Accordingly, the Federal Government maintained that the natural resources located within the CS of Nigeria are not derivable from the territory of any of the FCU. On the other hand, the FCU disagreed with the Federal Government’s contentions and claimed that their respective territories extend beyond the low-water mark on to the TS and even on to the CS and the EEZ. As mentioned earlier, the FCU in making the claims relied heavily on the natural prolongation principle under Article 76 (1) of UNCLOS, the contiguity and native title rights.⁷² On this basis, the FCU argued that the natural resources derived from both onshore and offshore are derivable from their respective territories and in respect thereof each of them is entitled to “not less than 13 per cent” allocation as provided in the proviso to subsection (2) of section 162 of the Constitution.

Several objections, some on points of law and some on points of facts, were raised

⁷¹(2002) 6 N.W.L.R., part 764, at pp. 553 - 557

⁷² See paragraph III, sub paras. 2 and 3 of thesis, pp.153 – 165 and pp. 166 - 174

by the defendants as to the competence of the court to entertain the suit in-view of the fact that the writ of summons and the statement of claim did not disclose any prima facie case that would warrant the attention of the court and whether it is proper in an action to determine the boundary of the FCU to join non FCU as parties. The court promptly dismissed the objections and decided *inter alia* that the:

“seaward boundary of a littoral state within the Federal Republic of Nigeria ...is the low water mark of the land surface thereof or, (if the case so requires as in the case of Cross River State with an archipelago of islands) the seaward limits of inland waters within the state.”⁷³

In arriving at this judgment, the court practically relied on the provisions of the Geneva Conventions, UNCLOS and on the decisions in *R vs. Keyn*, *Bonser vs. La Macchia*, *New South Wales & Ors. vs. The Commonwealth* and on the *US vs. Louisiana* and other cases to argue that:

“it is Nigeria as a sovereign state which can exercise jurisdiction and right as a coastal state over her territorial waters, contiguous zone, other zones in which she has a special interest and the high seas and will answer the claims of other members of the international community for, any breach of her obligations and responsibilities under international conventions ...and not her littoral states who have no international legal personality.”⁷⁴

1.1 Comments and criticisms on the manner of handling the case

This is a landmark decision in the history of adjudication in Nigeria, it is a decision that has the capacity to influence in one way or another the political, economic, security and national life of the country, but regrettably, the court seemed not to have grappled with the intertwined strands of precedent, history, political

⁷³ Ibid, per Ogundare J.S.C. p. 660

⁷⁴ Ibid, per Ogwuegbu J.S.C. in p. 828 – 829.

philosophy and local and international issues which make up the problem it was called upon to decide. The court in its judgment as seen above aptly demonstrated this ignorance by the numerous blunders, misconceptions and misapplications of certain concepts and principles of the law of the sea in the judgment. Furthermore, the court placed so much reliance on certain foreign cases some of which either through differential constitutional and historical experiences or through certain other occurrences could not be made directly applicable in Nigeria. Some of those decisions have simply been overtaken by other events and developments in the countries where the decisions were rendered, yet the Nigerian Supreme Court was more eager in adopting them as the basis of its own decision without first considering those developments.

The lawyers too, did not help the matter they (both the plaintiff and the defendant) demonstrated the highest level of ignorance of the basic principles of the law of the sea involved by their manner of presentation and of arguing the case. These obvious lapses on the part of the counsel had drawn the criticisms of Ikhariale, who observed that, "what happened was that the court was not sufficiently educated by the lawyers that appeared before it." In order to buttress his argument further, Ikhariale quoted conspicuously in his paper the criticisms of Professor Sagay as follows:

"Our court process in Nigeria is based on adversarial system under which the judge is supposed to make his decision based on the strength of the arguments presented by the parties...Consequently, no matter what the justice of the resources control litigation was, as long as the facts presented were not equally matched by the rules marshalled out to the court by the counsels, the outcome was bound to be distasteful."⁷⁵

While not exonerating the counsel that handled the resource control case from blame, Sagay's statement and the reliance placed on it by Ikhariale above cannot be totally supported. The statement overlooks and underestimates the roles of judges in adjudication. It assumes that all the judges need do while adjudicating on a case is

⁷⁵ Op. cit., n. 52

to be 'sitting ducks', who only watch and at the end of the day base their decisions solely on the arguments of lawyers and nothing more. No, the judges themselves, especially the Supreme Court justices whose judgments not only become law once delivered, but is equally binding and in most cases are subject to no appeal have to do more than that. They have to dig deep into statutes, and case laws, (both domestic and foreign) and where necessary in the resource control case, where they have little or no knowledge of the principles of the law of the sea required for a thorough adjudication of the matter make use of amici curiae who are experts on law of the sea to advise them. What the judges cannot do is to rule on matters not specifically pleaded by parties to a case. It will be recalled that when judges in *Re Dominion Coal Co. and County of Cape Breton* were faced with a similar situation of insufficiency of evidence, Currie J. undertook a personal research to compensate for the inadequacy of evidence in the case before him and also in order judiciously to determine the matter.⁷⁶

Granted that the judges are not trained experts of the law of the sea, the case exposes their failure or reluctance as the case may be to undertake intensive research into that area of international law as is expected of judges of their calibre. It equally exposes their unwillingness or is it reluctance to make use of amicus curia as they had once done in the case between the *AG of Ondo State vs. AGF and others*.⁷⁷ The numerous legal misconceptions contained in the judgment, seriously threatens the reliability that anyone could place on it as a judgment, which has been arrived at through erudite and competence expected of Justices of the apex Court. No wonder the judgment has been described by a commentator as a complete 'mix bag'.⁷⁸

Therefore, it behoves us to attempt to highlight some of the numerous misconceptions contained in the judgement, with a view to correcting the erroneous impressions portrayed by them. The misconceptions are categorised into two. The

⁷⁶ (1963) 40, D.L.R. (2nd), p. 614

⁷⁷ (2002), vol.6, Supreme Court of Nigeria Report (part 1)

⁷⁸ Vanguard Newspaper of 22nd August, 2004 in www.vanguardngr.com/articles/2002/politics/p222082004.htm

first is misunderstood international law concepts and the second is other serious errors.

1.2. Misunderstood concepts of international law

The following statements *inter alia* stand clearly discernible in the judgment, which if the judges had carried out a thorough research or had made use of *amici curiae* would not have been made at all:

(1) “While it is recognised in customary international law that the sea is *res nullius* and it is therefore available for the enjoyment of all nations of the world, land-locked nations inclusive...”⁷⁹

(2) “By the 1958 Convention the breadth of the territorial sea is a maximum of 3 miles.”⁸⁰

(3) “It is to be noted that the 3 nautical miles mentioned in the case were later extended to 12 nautical miles by the 1958 Geneva Convention on the Law of the Sea and Contiguous zone, which preceded the 1982 Convention on the Law of the Sea.”⁸¹

(4) “The Exclusive Economic Zone Act (Cap 116) was enacted in 1978 to give effect to the Treaty that preceded the 1982 Convention on the subject...”⁸²

(5) “All the 1958 Geneva Conventions relating to the sea are now superseded by the 1982 United Nations Convention on the Law of the Sea.”⁸³

⁷⁹ Ogundare JSC, op. cit., n. 162, p. 648.

⁸⁰ Ibid, at p.651

⁸¹ Ibid, per Uwais CJN, at p. 731

⁸² Ibid, per Ogundare JSC, at p. 652

⁸³ Ibid, per Ogundare JSC, at P. 649.

Paragraph (1) represents a gross misconception and lack of understanding of the basic principles of the law of the sea. It is wrong for the court to have referred to the high seas as being *res nullius*, instead of stating that it is *res communis*. The two concepts for all intents and purposes have different meanings, connotations and implications. *Res nullius* refers to a territory without a master or owner, in which case it is open to acquisition by anyone who could first assert legal title by way of control and unchallenged occupation.⁸⁴

Res Communis, on the other hand means free and belonging to the whole world and as a result cannot be subject to appropriation, occupation and control by a single state. The term is commonly used with reference to the seabed and ocean floor beyond the national jurisdiction, commonly referred to as the Area, which has now been constituted as the common heritage of the mankind by article 136 of UNCLOS and by a Resolution of the General Assembly.⁸⁵ The resources of the 'area', including the exploration and exploitation thereof are placed under the management and control of a body known as the International Sea Bed Authority. The benefits that would accrue when exploitation of the resources of the 'area' have become fully operational would be utilised for the benefit of mankind.⁸⁶ The initiative to constitute the seabed and subsoil of the high seas beyond the national jurisdiction as a 'common heritage of man kind' first came from the US President in 1963, followed by that of the Maltese Permanent Mission to the United Nations who submitted the proposal to that effect to the Secretary General of the UN for inclusion in the agenda for the 22nd session of the General Assembly on August 18, 1967.

⁸⁴ See *Island of Palmas case*, United States vs. Netherlands, (1928) 22 AJIL 867 – 912; *Clipperton Island case*, France vs. Mexico (1931)2, U.N Rep. 1105; *The Eastern Greenland case*, Denmark vs. Norway, PCIJ, Series A/B no. 53, p. 1913 and *Land and Maritime Boundaries case*, Cameroun vs. Nigeria (supra).

⁸⁵ General Assembly Resolution 2749 (XXV) of December, 1970. Article 137 (1) of UNCLOS stated that no State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources etc.

⁸⁶ See Articles 133 – 150 and Article 311(6) of UNCLOS; Brown, "International Law of the Sea (Introductory Manual)" (supra) at pp. 445 - 447

Similarly, the Moon and other Celestial Bodies have been constituted by international law as the common heritage of the mankind. In doing this, the United Nations General Assembly Resolution 1962 (XVII), adopted in 1963 set out certain legal principles, which include provisions that the outer space and celestial bodies were free for exploration and use by all states on the basis of equality and in accordance with international law and as a result cannot be subject of national appropriation in any way or means.⁸⁷ In 1967, the above mentioned principles were further reiterated and clarified by the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space. The emphasis here is that the exploration and the use of outer space by States must be for the benefit of all mankind. The Moon has also been constituted a common heritage of man kind in 1979 by the adoption of the Moon Treaty of that year. Article XI of that Treaty emphasises that the Moon and its resources are the common heritage of mankind, and as a result cannot be the subject of national appropriation. By virtue of this provision, the Moon and its resources are now subject to a special regime of exploitation.

It can therefore be seen that *res communis* and *res nullius* are more or less directly opposite and cannot be used interchangeably or in the sense that the Supreme Court had used it in the above-mentioned case.

With regard to paragraphs (2) and (3), it is not true that the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone or any of the 1958 Geneva Conventions specified the maximum breadth of the TS, whether at three or twelve nm. The distance specified by Geneva Convention is not that of the TS, but of the Contiguous Zone, which article 24 (2) says may not extend beyond twelve mile from the baseline from which the breadth of TS is measured.⁸⁸ It is the 1982 UNCLOS, which fixes the maximum breadth of the TS at 12 nm.⁸⁹ Prior to that

⁸⁷ See also, the General Assembly Resolution 1721 (XVI) and General Assembly Resolution 1884 (XVIII).

⁸⁸ Part II, Geneva Convention on Territorial Sea and the Contiguous Zone, 1958.

⁸⁹ Article 3, UNCLOS, 1982

time states were unable to agree on a precise width of TS, hence the conflicting claims by them. The three-mile TS happened to stand out among other TS claims as the one that enjoyed the acceptability of a few leading maritime States, but at the time of the Geneva Conventions of 1958, no agreement had been reached as to what the dimension of the TS should be.

On paragraph (4), it is completely erroneous for the Supreme Court to have asserted that the Exclusive Economic Zone Act (a domestic Act of Nigeria) was enacted in 1978 to give effect to the treaty that preceded the 1982 UNCLOS. It is common knowledge that the only treaty that preceded the 1982 UNCLOS is the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone or the Geneva Convention on the CS. As a matter of fact, the concept of EEZ did not exist at the time of the Geneva Conventions of 1958, it is therefore chronologically impossible for the Exclusive Economic Zone Act to have been enacted by the Nigerian legislature to give effect to a treaty which did not in anyway envisage the concept of EEZ.

The proposal for the adoption of EEZ was made for the first time during the deliberations at the third UNCLOS and this was overwhelmingly supported by many African and other nations to the extent that a number of them enacted domestic legislation to extend their maritime domains to include the 200 nm EEZ even before UNCLOS itself became operational.⁹⁰ Nigeria is one such nation that enacted Exclusive Economic Zone Act before the actual convention became operational; this must have informed the Supreme Court's erroneous comments because the Act itself predates the convention. The feverish adoption by coastal States of the provisions of UNCLOS regarding the EEZ before its final adoption in 1982, after Madagascar delivered the 60th ratification instrument needed to make

⁹⁰ Nigeria for example, claimed the 200-miles EEZ through the Exclusive Economic Zone Act, 1978, now amended by the Exclusive Economic Zone (Amendment) Decree, no. 42 of 1998; Ivory Coast (Cote D'Ivoire) through Law No. 77 – 929 of 17th November, 1977; Djibouti through Law No. 52/AN/78 Concerning the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, the Maritime Frontiers and Fishing of Djibouti of 9th January, 1979; Kenya through the Presidential Proclamation of 28th February, 1979 and Mauritius Maritime Zones Act, no. 13 of 3rd January 1977.

the convention come into force prompted the ICJ in the *Gulf of Maine case* to observe as follows;

“While the convention was not in force and a number of states have not ratified [it] cannot detract from the consensus reached upon large portions and [it] cannot invalidate the observation that certain provisions.... were adopted without any objection...its provisions may be regarded as consonant with general international law on the question.”⁹¹

Within three years, the ICJ held again that the “the EEZ is shown by the practice of States to have become a part of customary international law.”⁹² It emerged after the rejection of the various proposals put forward by the Latin American states, including the concept of the patrimonial sea. It may therefore be argued that the Exclusive Economic Zone Act enacted by the Nigerian legislature was not enacted to give effect to any Treaty but to give effect to a notion which was emerging in international law.

As far as paragraph (5) is concerned, it is not completely true that the 1982 UNCLOS now supersedes all the provisions of 1958 Geneva Convention relating to the sea. The sense in which the Supreme Court dealt with this issue is suggestive that the 1958 Convention had been repealed. It will be recalled that while the *Channel Continental Shelf case* was going on, France made similar argument that all the Geneva Conventions on the Law of the Sea had been rendered obsolete, because according to it, the consensus reached at the third UN Conference on the Law of the Sea indicated an emergence of a new law of the sea, where the rights and duties of coastal States had been clearly agreed. The Court of Arbitration though did not pronounce directly on the issue, it however stated that there is no basis for the obsolescence of the Geneva Conventions.⁹³ The Convention is thus not repealed as been portrayed the truth is that, to the States that have ratified the

⁹¹ (1984) ICJ Reports, p. 249.

⁹² *Continental Shelf case (Libya vs. Malta)* (1985) ICJ Reports, p. 13.

⁹³ (1979) 18, ILM, paragraphs 44, 45, and 46 of p. 387; O’Connell (*supra*) at p. 570

1982 UNCLOS, it supersedes the earlier convention for those States.⁹⁴ However, to States that ratified only the 1958 Geneva Convention, but have not yet ratified or are not yet party to the 1982 UNCLOS, the provisions of 1958 Geneva Conventions continue to operate in those States.⁹⁵ Thus, States such as the United States of America, Libya, Venezuela, Peru, Israel and Turkey for one reason or another have not yet ratified the 1982 UNCLOS, to them therefore, especially those that have ratified the 1958 Geneva Convention, that convention continues to operate for them.

1.3 Other serious errors in the case

The Supreme Court quoted extensively from a portion of the judgment in *R vs. Keyn case*, which is to the effect that:

“The consensus of civilised independent states has recognised a maritime extension of frontier to the distance of three miles from low-water mark, because such a frontier or belt of water is necessary for the defence and security of adjacent state. It is for the attainment of these particular objects that dominium has been granted over this portion of the high seas ...”⁹⁶

In order to demonstrate that the coastal State does not possess the same rights it possesses over its land territory over the TS, the court proposes the following tests:

(1) That a State has the right to refuse entry or passage of foreigners over its territory by land, whether in time of peace or war but in the court’s view, the State does not appear to have similar rights with respect to preventing the passage of foreign ships over this portion of the high seas. That is, in the TS there is no *jus transitus* but in the land territory there is. Based on this passage, the Supreme Court in the Nigerian case under reference concluded that:

⁹⁴ Article 311 (1), UNCLOS

⁹⁵ Ibid, paragraph 5. The comments above are made on the basis of the implication of the provision of this paragraph.

⁹⁶ Supra, pp. 81 – 82

“What the federation has over the territorial waters and airspace is the power to exercise sovereignty over the territorial waters and airspace and not that territorial sea constitutes extension of the boundary of Nigeria or indeed the littoral states.”⁹⁷

(2) Furthermore, in its attempt to demonstrate that Nigeria does not have full sovereignty over the TS, the air space above it and the sub soil beneath, the court made reference to the provisions of some Nigerian Statutes such as the Sea Fisheries Act, the Exclusive Economic Zone Act and particularly the Territorial Waters Act. According to the court, the Territorial Waters Act is for example concerned, *inter alia* with matters of jurisdiction in respect of offences committed in the territorial waters and restriction on Nigerian courts from trying persons other than Nigerian citizens for offences committed in territorial waters. Three issues can be identified from the statement of the court above:

- (a) That Nigeria does not possess full sovereignty over the TS.
- (b) That it is only the right of jurisdiction that Nigeria possesses over the TS and that the right of jurisdiction in question does not even extend to offences committed by foreigners in the TS of Nigeria. In other words, that the jurisdiction of the Nigerian courts does not extend or cover offences committed by foreigners over the TS of Nigeria. That is, the Nigerian courts could try only offences committed by Nigerians on the TS.
- (c) That the TS does not form part of either national territory or part of the territory of the FCU and that Nigeria does not have the right to prevent or restrict right of innocent passage.

It is humbly submitted that the aspect of the court's judgment above is a legally impossible conclusion as far as the nature of TS is concerned. It follows therefore, that the Nigerian laws cited merely demonstrate the shortcomings of those laws and

⁹⁷ Supra, per Uwais C.J.N., p. 731 (emphasis added).

the need for their amendment to take cognisance of the current position of international law on the matter. The court's tests as seen above and the issues they have raised will be categorised as follows for criticism.

2. Evidence of TS forming part of land territory of adjoining State

This may be classified into statutory, opinion juris and judicial evidence.

2.1 Statutory evidence

It may be true for instance, that the sovereignty of coastal States over the TS is limited as noted by the court above, but this alone cannot be interpreted to mean that the TS does not form part of the land territory of the adjoining State or that the adjoining State does not possess full sovereignty over it. It is a recognised rule under the current principles of general international law as provided by Article (2) (1) of UNCLOS, that the sovereignty of a coastal State extends beyond its land territory and internal waters to an adjacent belt of sea, described as the TS. This sovereignty according to that article extends to the airspace, the seabed and subsoil of the TS and must be exercised subject to UNCLOS and to other rules of international law.⁹⁸ Thus, the TS has been severally described as forming part of the territory, which it adjoins, thereby extending the territorial sovereignty of the adjacent State over land to that area of the sea.⁹⁹ Therefore the Supreme Court by its conclusion above must be taken not to appreciate properly the current nature of governmental power and control that international law has conferred or bestowed on coastal States over the TS, the airspace above, the seabed and subsoil underneath it.

2.2 Opinio juris evidence

For example, before this position was incorporated in International Conventions, there existed numerous authorities most of which affirmed the inseparability of TS from the adjacent land territory. For instance, Welwood writing as far back as the

⁹⁸ Article 2(3) UNCLOS

⁹⁹ Article 2 (1), UNCLOS

year 1616 had stated that coastal waters must have the same owner as the adjacent land, and because such waters are so closely linked to and so incorporated into the land, such dominium of the adjacent land cannot be diminished by lease or alienation. The question of inalienability by coastal State of its TS has been disputed by early writers such as Bynkershoek, who was of the opinion that a coastal State could dispose of its TS without necessarily disposing of the land territory thereof. This view has however been described by Oppenheim/Lauterpacht in his treatise on international law where he held that, it is “...evident that the territorial waters are as much inseparable appurtenances of the land as are the territorial subsoil and atmosphere” and that “only pieces of land together with the appurtenant territorial waters are alienable parts of territory.”¹⁰⁰

Oppenheim's views have been further buttressed by the writings of Verzijl, who has expressed the view that not only is a state precluded from either reducing its breadth of TS or renouncing it entirely, at international law, but also that it is juridically impossible for a State to transfer part of its TS to another State without any accompanying land territory.¹⁰¹ In other words, Verzijl takes this view in his realisation that “as a general rule” the territorial sea has no independent existence as an element of the national territory, severed from the coast which it borders.”¹⁰²

In a recent article, Professor Anyangwe while referring to territorial regime stated; “concerning the former regime (territorial regime), all the land area of the world, together with the contiguous territorial sea, have been appropriated by sovereign States.”¹⁰³ By so stating, the learned Professor's statement must be taken also to imply or is an acknowledgment that the TS already forms part of the territory of the state it is contiguous to.

¹⁰⁰ Lauterpacht, M., *Oppenheim's International Law*, vol. 1, (8th edition), Longmans, Green and Co., London and New York, (1955), p.463 et. Seq., 488

¹⁰¹ Verzijl, J.H.W., *International Law in Historical Perspective*, vol. iii, A.W., Sijthoff Leyden, (1970), p.54, 55

¹⁰² Ibid, at p. 55.

¹⁰³ Anyangwe, C., “African Border Disputes and their settlement by International Judicial Process,” vol. 28, (2003) *SAYIL* p 29(emphasis added).

2.3 Judicial evidence

Verzijl's view above is consistent with the decision in the *Grisbadarna Arbitration case*, which is concerned with the determination of maritime limits between Norway and Sweden, *Beagle Channel case*¹⁰⁴ and in the dissenting opinion of Lord McNair in the *Anglo-Norwegian Fisheries case*.

For example, in the *Grisbadarna case*, the Permanent Court of Arbitration stated that it was:

"In accordance with the fundamental principles of the law of nations, both old and new," that when territory was ceded to Sweden: "the radius of maritime territory constituting an inseparable appurtenance of this land territory must automatically formed part of this cession."¹⁰⁵

Similarly in the *Anglo-Norwegian Fisheries case*, Lord Arnold McNair re-emphasized the point further by stating that:

"To every state whose land territory is *at any place washed by the sea*, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters...International law does not say to a state: 'You are entitled to claim territorial waters if you want them.' *No maritime state can refuse them* ...The possession of this territory is not optional...but compulsory."¹⁰⁶

Is there any doctrinal reason why a coastal State cannot lease in perpetuity a body of water appurtenant to the land territory without the land territory being similarly leased? There seems to be no strict doctrinal reason why a coastal State cannot lease its TS in perpetuity, without necessarily leasing the adjoining land territory. The doctrinal reasons of "appurtenance" and of the "natural extension" of land territory into the sea, which have been offered as reasons why the TS cannot be leased *suo*

¹⁰⁴ HMSO, 1977; 52 ILR, p. 93.

¹⁰⁵ (1909), Hague Reports, p. 121 at 127

¹⁰⁶ (1951), ICJ Reports, p.116 at p. 160 (emphasis added).

moto without the adjacent land areas being also leased can be countered in view of a lease in perpetuity contained in the Convention for the Construction of a Ship Canal (Hay – Bunau – Varilla Treaty) of November 18, 1903.¹⁰⁷ Under Article II of the Treaty, Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the centre line of the route of the Canal to be constructed. However the proviso to this article is that the cities of Panama and Colon and the harbours adjacent to the said cities, which are included within the boundaries of the zone described in Article II, shall not be included within this grant. Article III on the other hand states *inter alia* thatthe United States would possess the areas granted as if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights or authority.¹⁰⁸

The exclusion of the cities of Panama and Colon including the harbours thereof, clearly indicates that it is possible to lease TS in perpetuity without necessarily leasing the adjoining land territory. In *Petroleum Development Ltd vs. Sheikh of Abu Dhabi*,¹⁰⁹ we also see the possibility of a transfer of imperium over the TS, without a corresponding transfer of the dominium thereof.

Contrary to the views of the Supreme Court of Nigeria that the TS is not an extension of the boundary of Nigeria, the court in Australia had an occasion to express a view on the matter. This was in the case of *Silverdick vs. Aston*, which has to do with the validity of the Commonwealth war precautions Act and Regulations. One of the grounds taken was that the Act was *protanto* invalid as being beyond the constitutional power of defence, the contention being that the power of defence did not extend beyond the limits of Australia. Isaac J (as he then was) dealt with the contention as follows:

¹⁰⁷ <http://www.yale.edu/lawweb/avalon/diplomacy/panama/pan001.htm>

¹⁰⁸ Ibid.

¹⁰⁹ *Supra*, CF North Coast Atlantic Fisheries case (Britain vs. US) (1910) 4, AJIL

“As to the Act itself, the objection has no merit. It is absurd to limit the effectual defence of Australia or any country to operations on its own territory. Imagine the Navy confined to the three mile limit.”¹¹⁰

The learned Judge in so expressing himself clearly intended to convey that the waters within the three-mile limit were part of the territory of Australia.

If the above examples do not emphasise the principle of inseparability enough, perhaps the question of the status of territorial waters off the coasts of Northern Ireland, which had engaged the attention of the Resident Magistrate court in Cushendall, Northern Ireland and later the court of Appeal would. This was initially in the case between *Weaver vs. McNeill*,¹¹¹ however the name of the case changed at the appeal court because of the intervention of the Director of Public Prosecution. The case is now known as *D.P.P. of Northern Ireland vs. McNeill*.¹¹² That case involved a complaint preferred against the defendants by the Chief Inspector of the Fisheries Conservancy Board for Northern Ireland. The charge was brought pursuant to section 99 (1) (a) and (b) of Fishery Act (Northern Ireland) 1966, which provides as follows:

(1) During the weekly close time;

- (a) The netting of the leader of every bag net used for catching salmon shall be raised and kept out the water; and
- (b) All other nets used as fixed engines for the taking of salmon or trout shall be wholly removed from the water.

It was alleged that the defendants in July 1973 failed to comply with the provisions above.

At the Resident Magistrate court, the trial magistrate declined jurisdiction to try the case on the ground *inter alia* that the Fisheries Act under which the complaint was

¹¹⁰ (1918) 25 C.L.R. p. 506 at 517

¹¹¹ Unreported; judgment delivered on 27th June 1974. The case is fully discussed in the Article of Symmons C.R., ‘Who Owns the territorial Waters of Northern Ireland? Vol. 27, no. 1, *Northern Ireland Legal Quarterly*, p. 48 - 66

¹¹² Unreported; Judgment delivered by the Northern Ireland Court of Appeal (1975). See also C.R.Symmons (Ibid).

brought is “ultra vires the power of Northern Ireland Parliament and that on the basis of section 1 (2) of Government of Ireland Act, 1920 which defined “Northern Ireland” in terms of parliamentary or electoral areas of the six counties:

“The parliament of Northern Ireland had not power to make laws except on matters exclusively relating to the portion of Ireland within its jurisdiction or some part thereof,” and that “[a] parliamentary boundaries end at high water mark, the jurisdiction of this parliament could not extend to sea and tidal waters.”¹¹³

In other words, the Magistrate purported that the TS is not part of the territory of Northern Ireland. The case went on appeal on a case stated to the Court of Appeal of Northern Ireland and the ruling of the Resident Magistrate Court was set aside on the basis *inter alia* of inseparability principle and the principle that a statute of the parliament of the United Kingdom is not capable of challenge in a domestic court in the United Kingdom.¹¹⁴ The territorial waters surrounding Northern Ireland was therefore adjudged to be part and parcel of it.

3. Evidence of Exercise of criminal jurisdiction over offences committed by foreigners on the TS

There are statutory and judicial practices in support of criminal jurisdiction by coastal States over offences committed within the TS by foreigners.

3.1 Statutory provisions in support of exercise of criminal jurisdiction in the TS

Contrary to the judgment in *Abia case* and notwithstanding the obvious limitations on sovereignty over the TS, international law provides circumstances under which a coastal State may exercise its criminal jurisdiction over offences committed by foreigners on the TS. These circumstances include those provided under Articles 19 (2), 20, 21, 25 and 27(1) & (2) of UNCLOS. Article 19 (2) for instance, listed the activities considered to be prejudicial to the peace, good order or security of a

¹¹³ Ibid

¹¹⁴ See, *Mortensen vs. Peters* (1906) 8 Fraser 93 (J); *Croft vs. Dunphy* (1933) A.C.156 and *I.R.C. vs. Collco Dealings Ltd.* (1959) All E.R.351; (1962) A.C. 1

coastal State. It grants the coastal State the power to prevent the passage by foreign vessels engaging in any of the activities mentioned in that paragraph within the TS. Similarly the more detailed definition of innocent passage contained in that article provides that passage is not innocent if the foreign ship concerned engages in wilful pollution or fishing or loads commodities or people contrary to the customs, fiscal and immigration or sanitary laws of the coastal State.

On whether the courts in Nigeria have jurisdiction to try offences committed by foreigners within the TS, the Supreme Court in making such an assertion has failed to take cognisance of the provisions of Article 21 of UNCLOS, which gives coastal States the right to enact domestic laws dealing with safety of navigation, navigational aids, protection of cables and pipelines, conservation of the living resource and preservation of marine environment etc. Though the steps to enforce non compliance by foreign vessels with the provisions is not stated, but it would appear that after a coastal State has informed the offending vessel of its transgression and no compliance has been made after a request to do so has been issued by the coastal State, the coastal State can use reasonable force to ensure compliance by the offending vessel.

Furthermore, the provisions of Articles 25 and 27(1) of UNCLOS give coastal States certain other rights over the TS, which the Nigerian Supreme Court in the above mentioned case did not consider. For instance article 25(1) gives a coastal State the right to take necessary steps within its TS to prevent passage which is not innocent. This according to paragraphs (2) and (3) may include taking necessary steps to prevent the breach of conditions of entry by ships proceeding to its internal water, including temporary suspension of innocent passage in specified areas of its TS without any discrimination among foreign ships. Article 27 on the other hand prohibits the exercise of criminal jurisdiction by coastal States for offences committed by foreigners on board foreign ships but the same article goes further in granting some exceptions to coastal States in paragraphs (a) to (d). In these

exceptional circumstances, a coastal State may exercise its criminal jurisdiction on board foreign ships if:

- (a) The consequences of the crime extend to the coastal state;
- (b) The crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) The assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state; or
- (d) Such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

3.2 Judicial decisions in support of exercise of criminal jurisdiction in the TS

There is evidence of arrests and conviction made on the basis of similar provisions as the above in Jamaica. This is Article 19 (1) (a – d) of the Geneva Convention on the Territorial Sea of 1958 and the case is *R vs. Dankin and others*. In that case a Jamaican Court of Appeal relying on the provisions of the above mentioned Geneva Convention upheld the conviction of Dankin, who with others were arrested on the Cayman Island right on the TS of Jamaica for possessing narcotic drugs on board their ships. Their argument that they were arrested in breach of the 1958 Geneva Convention, which according to them granted them the right of innocent passage did not hold sway as the court noted that there was evidence from which it could be inferred that the ships were engaged in illicit traffic in narcotics and were therefore covered by the exceptions to the principle of innocent passage provided by Article 19(1) (d) of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958 and the schedule 1 to the Jamaican Territorial Sea Act.¹¹⁵

There is also evidence to show that Nigeria has on several occasions exercised its criminal jurisdiction in apprehending and prosecuting foreign ships including their crew and Nigerian collaborators found to be engaging in illegal activities, such as bunkering, pollution, dealing with narcotics and other psychotropic substances,

¹¹⁵ ILR vol. 73, p. 173

smuggling and poaching to mention just a few within the TS of Nigeria. Example of such arrests and prosecution include the arrests of 13 Russian sailors on board a ship – Mt African Pride, which later disappeared mysteriously from the custody of the Nigerian Navy and their subsequent arraignment on two counts charge of crude oil bunkering.¹¹⁶ As this case is currently ongoing, the accused and their Government have never challenged the authority of the Nigerian Government for making the arrests or the jurisdiction of the court for trying the accused persons. The Russian Government through its embassy merely criticised the long detention without trial and bail. Bail has however been granted through the intervention of the Russian Government and the provision by it of the requisite bonds and assurance that the accused would always be available in court at subsequent adjourned dates. This in effect could be interpreted as recognition by both Russia and the accused of the sovereignty of Nigeria over the TS where the offence was committed, notwithstanding their being foreigners.

Other arrests have equally been made and the three vessels involved – Mt Zoogu, Mt Tina and Mt Glory have been respectively impounded by the Nigerian Navy between April and August, 2003 and the foreign collaborators detained.¹¹⁷ By the current trend on the so called war against terrorism, it would appear that Nigeria like any other coastal State could exercise its jurisdictional and sovereign powers to carry out arrest and prosecution of foreign ships and their crew members found engaging in acts of terrorism using the territorial waters of Nigeria as a launching pad. Such action wherever it is exercised would no doubt be covered by Article 27 (b) of UNCLOS.

Similarly, as the sovereignty of a coastal State is limited by the right of innocent passage in the TS, so also is its sovereignty limited over the internal waters. This is the case for instance where a coastal State has by virtue of Article 8 (2) of

¹¹⁶ Federal Republic of Nigeria vs. Krasikov Alesey Zernakov Alexander and others, FHC/W228C/2004

¹¹⁷ See the statement of the Commanding Officer, NNS, Delta in the Article by Amazie, E. and Omonobi, K., 'Oil Bunkering: Navy impounds 3 vessels', Vanguard Newspaper of 23, October, 2004 in <http://www.vanguardngr.com/articles/2002/nationalx/nr523102004.html>

UNCLOS enclosed as internal waters by the drawing of straight baselines areas, which hitherto had not been considered as such; the right of innocent passage continues to exist notwithstanding that the area is now internal waters. It follows therefore, that the criminal and civil jurisdictions of the coastal State over foreign vessels and their crews are equally limited. However the coastal State just as in the case of TS can exercise its criminal and civil jurisdictions over foreigners whose activities in this zone fall within the exceptions in Article 19 of UNCLOS. Thus the US Supreme Court in *Wildenhus case* held that a murder committed by one crew on another both of them being Belgians committed on board a Belgian steamship in dock in Jersey City ipso facto disturbed the public peace onshore and as a result the United States had jurisdiction.¹¹⁸ In *Post Office vs. Estuary Radio Ltd*, the English Court of Appeal exercised civil jurisdiction over a defendant who operated without a licence a wireless transmission station at a tower in the Thames estuary considered by the court as falling within the internal waters of the United Kingdom.¹¹⁹

With regards to submarines and other under water vehicles, article 20 of UNCLOS requires them to navigate on the surface and to show their flag. The question is whether UNCLOS by this provision prohibits submerged innocent passage? What happens for example if a submarine in exercising innocent passage across the TS of Nigeria fails to navigate on the surface? In the first instance, UNCLOS does not *stricto sensu* prohibit submerged innocent passage by submarines and other underwater vehicles in the TS, what it does is that it secures a regime for innocent passage. Thus if a submarine or other under water vehicles navigate submerged on the TS, they do not enjoy the right of innocent passage and as a result a coastal State may prohibit the passage, but this depends to a very large extent on the relationship between the coastal State and the flag State of the submarine or other under water vehicles. It also depends on whether such submarine or other underwater vehicles are naval submarine in which case immunity rights will avail

¹¹⁸ 20, US 1887

¹¹⁹ (1967) P. No. 1216

them. Thus if a submarine decides to navigate submerged instead of on the surface of TS, the affected coastal State could take necessary measures to ensure immediate departure of the submarine, especially if the submarine has refused to heed the initial request made by the coastal State to it to leave its TS.

4. Right of innocent passage as a limitation on exercise of full sovereignty over the TS

Evidence abounds to demonstrate that contrary to the Supreme Court of Nigeria's decision in the case under review, the power of Nigeria over the TS like many other coastal States the world over, transcends mere jurisdictional power to that of sovereignty, limited only by the concept of innocent passage by foreign vessels. This limitation is an old practice of States, which only became codified in an international agreement in the 1958 Geneva Convention on Territorial Sea and the Contiguous Zone¹²⁰ and in the 1982 UNCLOS.¹²¹ The limitation differentiates between sovereignty over the TS and sovereignty over the land territory, but this does not in any way derogate or erode the sovereign power of a coastal State.

In arriving at the decision in *Abia case*, the Supreme Court relied heavily on statement in *R vs. Keyn*, which is to the effect that the right of innocent passage prevented coastal States from exercising full sovereignty over the TS. Regrettably however, this argument cannot be supported in all its ramifications. This is so because the land territory and the marginal sea or internal waters as the case may be where the sovereignty of a coastal state is incontrovertible, one way or another, are subject to other rights and one cannot as a result conclude that they no longer constitute land territory or internal waters of the adjacent state or that the state no longer possesses sovereignty over it.

As a general rule, the regime of internal waters of a state is not subject to the right of innocent passage, except in situations provided for under Article 5 (2) of the

¹²⁰ Article 14 (1) of Geneva Convention on Territorial Sea, 1958

¹²¹ Article 17, UNCLOS

Geneva Convention on Territorial Sea and Article 8 (2) of UNCLOS, where as a consequence of straight baselines delimitation, a State had enclosed within its internal waters areas, which hitherto was considered as forming part of the TS or high seas. In such a case, the right of innocent passage will continue to apply. Similarly, Statute on the International Regime of Maritime Ports of 1923 gives States, which are parties to it reciprocal rights of entry into the ports of the others even though the ports are located within the internal waters of the States.¹²² These rights can equally be conferred by means of treaty relations as was the case between Japan and the United Kingdom in 1962, by which the vessels of their respective States have freedom of access to the ports, waters and places open to international commerce and navigation of the other.¹²³

Among the member States of the European Union¹²⁴ and the ECOWAS States for example, there is freedom of entry by the citizens of the member States to the land territory of another member State without a visa; this freedom has been secured in both cases by the agreement of member States, just as the right of innocent passage of foreign ships over the TS, which has existed as customary law right long before its codification in the Geneva Conventions and in UNCLOS. In both cases, the freedom of entry granted cannot in any way be interpreted to mean derogation by the affected States of their sovereignty over their land territories.

There is also a right of passage known as 'exceptional rights of innocent passage'; this could be exercised within the internal waters of States by foreign vessels even though right of innocent passage does not legally exist in the internal waters of a State. Thus, a foreign ship in distress or where there exists force majeure could stop or anchor and could also enter into the nearest port even though the port is located within the internal waters of another State. This also extends to ships rendering

¹²² Soresen, M., "Law of the Sea (International Conciliation," No. 520)," (1958), *Michigan Law Review*, p.235

¹²³ Brown, E.D., *The International Law of the Sea, vol. 1, Introductory Manual* Dartmouth, England, (1994) p.39

¹²⁴ Articles 14(2), 61(a) and 62 (1) (2), Consolidated Version of the Treaty Establishing the European Community in Nigel F., Blackstone's EC Legislation, 2002 – 2003, 13th Edition .

assistance and may also avail warships on similar situation. The exposition of this principle is contained in article 18 (2) of UNCLOS and in the decision of the Court in Hoff (*the Rebecca case*), where it is stated:

..Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel need not be in such a condition that it dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf.¹²⁵

The right of innocent passage of foreign ships including ships in distress is an exception to the fundamental principle, which would be restrictively interpreted in case of doubt but they are never rights, which completely or in any way divest a State of the sovereignty she possesses over the TS. They are rights secured by agreement of States and merely demonstrate the fact that sovereignty in any given territory is not absolute, its exercise can be limited either by agreement of parties and the rules of international law, be it customary or conventional. This much was recognized by the Permanent Court of International Justice in the *S.S. Wimbledon case* as follows:

“The court declined to see in the conclusion of any Treaty by which a state undertakes to perform or refrains from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the state, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of state sovereignty.”¹²⁶

Equally true is the right of innocent passage through historic bays considered to be internal waters of the state it adjoins, thus the court in *Land, Island and Maritime Frontier dispute* after recalling that, “...general international law does not provide for a single ‘regime’ for ‘historic waters,’ or ‘historic bays,’ but only for a particular

¹²⁵ (1929), 4 R.I.A.A. p. 444 at 447

¹²⁶ (1923) P.C.I.J. at p.42

regime for each of the concrete recognized cases of 'historic waters,' or 'historic bays,'¹²⁷ the court examined the peculiar situation of the Gulf of Fonseca, '...which is a pluri- state bay and is also an 'historic bay.'"¹²⁸ In endorsing the opinion of the Central American Court of Justice that a right of innocent passage existed in the internal waters of the historic bay held in co – ownership by the three riparian States, the court reaffirmed that...rights of innocent passage are not inconsistent with a regime of historic waters.¹²⁹

Further to the above, article 125 of UNCLOS gives to the land-locked States the right of transit passage through either the land territory or internal waters of another State for the purpose of having access or exercising the right of freedom of the high seas and common heritage of the mankind. This right the article says the land-locked States can exercise through all means of transport but according to paragraph (2) of article 125 before such right of access could be exercised, the terms and modalities for its exercise must first and foremost be agreed between the land-locked State and the transit State. It is however doubtful if the land-locked States can exercise the right of over flight over the land territory, the internal and territorial waters of the transit State except with prior agreement or authorization, because by virtue of Article 1 of the Chicago Convention of 1944, the sovereignty of the coastal States covers the airspace above the areas, hence there is no right of over flight by foreign aircrafts over both internal waters and the TS except by prior authorization. The position is the same in the case of a strait, which was formerly part of the high seas, but which has been converted from its high seas status to internal or archipelagic waters by reason of bay closing or the drawing of straight or archipelagic baselines. The exercise of right of innocent passage over the TS or the mere fact that the ownership thereof is subject to the public right of usage by the citizens of a country does not preclude a State from possessing sovereignty over it.

Above all, these rights according to article 25 (3) of UNCLOS can be temporarily

¹²⁷(1992) ICJ Reports, p. 351 at 589 quoting from (1982) ICJ Reports, p. 74.

¹²⁸ Ibid, at 593

¹²⁹ Ibid.

suspended where the security of a coastal State demands a temporary suspension of innocent passage. This informs the various suspensions made in certain specified areas of the TS by Mexico, between 27 December, 2004 and 15 August, 2006.¹³⁰

5. Nigeria exercising jurisdiction in the high seas

Further to the above discussions, it is erroneous for the Supreme Court in the Nigerian case above to have included High Seas in the list of maritime zones over which Nigeria could exercise jurisdiction and sovereign rights. The inclusion of high seas as noted above portends a uniform treatment with the EEZ and the CS, whereas, the only jurisdictional rights Nigeria can exercise on the high seas are on the ships flying Nigerian flag.¹³¹ Furthermore, Nigeria can by virtue of article 99 of UNCLOS exercise jurisdiction over a ship flying its flag, which is found transporting slaves. It can also by virtue of article 98 exercise jurisdiction over the ships flying its flag, which have been required to assist in an emergency. With respect to the offence of piracy, which is an offence that can only be committed on the high seas,¹³² Article 100 of UNCLOS requires all States to cooperate to the fullest possible extent in the repression of it on the high seas or in any other place outside the jurisdiction of any State. By virtue of this provision therefore, Nigeria can exercise jurisdiction over a pirate ship on the high seas or outside its usual jurisdiction. Pursuant to the provisions of Article 221 of UNCLOS, Nigeria after a due consideration to international law, both conventional and customary may undertake enforcement measures against vessels, including vessels flying other States flags beyond its TS, which are proportionate to the actual or threatened damage to protect its coastline or related interests, including fishing, pollution or the threat thereof etc.

Furthermore, by virtue of Article 17 paragraph (2), (3) and (4) of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Nigeria may exercise jurisdiction on vessels flying its flag, which is involved

¹³⁰ http://www.un.org/Depts/los/convention_agreements/inocent_passages_suspension.htm

¹³¹ Article 94, UNCLOS

¹³² Ibid, Article 101

in drug trafficking or it may in the case of a vessel not displaying a flag or marks of registry but which is engaged in illicit traffic in drugs request assistance of other parties in suppressing its use for that purpose. Similarly by virtue of paragraph (3) of the same article, Nigeria may after due notification and authorization take appropriate measures on a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying the marks of registry of another party, which is found trafficking in drugs and other psychotropic substances. Thus paragraph (4) of article 17 provides: In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those parties, the flag State may authorize the requesting State to *inter alia*:

- (c) Board the vessel;
- (d) Search the vessel;
- (e) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5.1 The Proliferation Security Initiative (PSI)

Under this initiative, announced by the US President, George Bush on the 31st of May, 2003, participants may stop shipments of Weapons of Mass Destruction (WMD), their delivery systems, and related materials worldwide. The goal of the scheme is to “create a more dynamic, creative, and proactive approach to prevent proliferation to or from nation States and non-state actors of proliferation concern. The method to achieve the goal without infringing international law which guarantees freedom of the high seas and of the air space above it has been stated to include, “inventive use of national laws, rather than an attempt to re-write existing international law, which prohibits stopping vessels on the high seas or grounding aircraft in international space.” The scheme which began by initial eleven (11) members now has about sixty (60) States as members.

Under the scheme participating States and subsequently supporting States have committed themselves to interdicting within their airspace, internal waters, TS and contiguous zone ships reasonably suspected to be carrying WMD and related materials, especially when such shipments are meant for certain States or terrorist groups by the application of their national laws.

A point of departure from the original idea of the scheme, which limited the scope of operation of PSI within the internal waters, TS and the contiguous zone of the participating States was reached when the then US under Secretary of State, John Bolton stated at the conclusion of the coalition's first meeting in Madrid that "there is broad agreement within the group that we have [the] authority to begin interdictions on the high seas and in international airspace."¹³³ The statement stirred controversy among the participants but in essence it clearly indicates the US position that PSI was not going to be restricted only to the zones mentioned above. The US has justified the above position on the following grounds:

- (a) When ships do not display a nation's flag, that such ships effectively become pirate ships that can be seized;
- (b) When the ships use a "flag of convenience" and the nation chosen gives United States or its allies permission, the ship can be stopped and searched;
- (c) That there is a general right of self defence given a serious belief that the vessels carry WMD material.
- (d) The position is equally justified based on the UN Security Council Resolution 1540, which was unanimously adopted by the Security Council and which calls on States to take cooperative action to prevent trafficking in WMD. The PSI is seen as one of such cooperative actions authorised by the above mentioned Resolution.

Items (a) and (b) above could be reasonably argued to be consistent with international law, except that in item (a) there must be the initial demand that the ship display and show its flag before any action could be taken. A look at Article

¹³³ Weiner, R., "Proliferation Security Initiative to Stem Flow of WMD Matériel" (2003) in <http://cns.miis.edu/pubs/week/030716.htm>.

91(1) of UNCLOS for instance reveals that ships have the nationality of the States whose flag they fly. Article 92 on the other hand forbids ships from flying more than one flag save in exceptional cases expressly provided for in international treaties or in UNCLOS and a ship may not change flags according to convenience. Therefore where a ship sails under the flags of two or more States and using them according to convenience, such a ship according to Article 92(2) may be assimilated to a ship without nationality and as such under PSI may be interdicted if it is suspected of carrying WMD.

The justification here for ships may not be applicable to aircraft in the international airspace. There is also justification for item (d) referred to above in virtue of Articles 7, which recognises situations whereby some States may require assistance of other States in carrying out obligations under the resolution and articles 9 and 10, which call upon States to dialogue and cooperate on non proliferation, PSI may therefore be seen as a kind of such cooperation. It should also be borne in mind that the UN Security Resolution referred to has been passed pursuant to Chapter VII of the UN Charter indicating that it is a binding resolution. What may be difficult to justify in the circumstance is whether mere carriage of WMD by vessels or aircraft gives the right of self defence as claimed in (c) above in view of the multilateral consent.

Presently too, the International Maritime Organisation (IMO) is considering a review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the PSI participating States and those that support it may seize the opportunity of the review to press for inclusion in the review clause(s), which authorises States to interdict vessels or aircraft reasonably suspected to be carrying WMD or other related materials in any part of the seas including in the airspace. This being the case Nigeria like any other State would be entitled to interdict any vessel or aircraft reasonably suspected of carrying WMD or related material (including Government vessels, which ordinarily enjoy immunity from

such actions)¹³⁴ in any part of the sea once the circumstances warranting such stopping, boarding or arrest fall within a-d above.

It may be argued therefore, that while it may be true that Nigeria like any other coastal State may exercise certain limited jurisdictions in the high seas, the circumstances of its exercising sovereign rights in the same zone remains to be seen.

6. Other flaws in the case

The case is further beset by certain fundamental shortcomings like the total absence of any maritime chart for the guidance of the court in the determination of the case. Similarly, Nigeria has not formally claimed any straight baselines; this makes the measurement of all other maritime zones to begin from the low-water mark. However, the precise location of the low-water line of Nigeria is uncertain due to the poor mapping of the coastline and its swampy and unstable nature, coupled with the ever present sand bars. More importantly, adoption of the low-water mark is not normally dependent upon court pronouncement, but on hydrographical conditions, which takes a tidal cycle of 18 ½ years to calculate. It is after the average range has been measured that points of low-water mark are marked on charts officially recognised by the coastal State. It is therefore not clear upon what geographical coordinates or hydrographical parameters or criteria and conditions the court had relied in concluding that the boundary of the FCU and consequently the boundary of Nigeria ends at low-water mark without any maritime chart, which would have been a product of calculated hydrographical conditions. It would seem from the provisions of Article 5 of UNCLOS that the existence of the low-water mark is contingent upon publication of large-scale charts officially recognised by a coastal State. The court's decision on this point has implications and raises the following questions:

¹³⁴ Articles 95 and 96 UNCLOS

- (1) Was the court at the time of drawing up the decision relying on the practice of States of adopting the low-water mark as opposed to the high-water mark, or the mean between the two tides?
- (2) Or was it simply following the decision in *R vs. Keyn* case?
- (3) Could it be argued that the Article 5 obligation applies only to other States demanding Nigeria to produce a proper map, charts etc?
- (4) Can the Court simply stop at the point of low-water mark leaving the precise determination to cartographers?

Obviously, the court could not be said to be following the practice of States on this issue. This is so because the practice of States in question admits to a number of exceptions as seen in the *Anglo – Norwegian Fisheries case (U.K. vs. Norway)*¹³⁵ and also under the provisions of both the Geneva¹³⁶ and UNCLOS,¹³⁷ from which Nigeria by the nature of its coastline may stand to benefit. Example of such conditions includes the presence of fringing islands on some parts of the coastline and the presence of a major delta, which makes that segment of Nigeria's coastline to be highly unstable and which entitles Nigeria to adopt a straight baselines system in delimiting that segment of the coastline where the conditions are present.¹³⁸ Even then, the adoption of a straight baselines system under the conditions described above would still need the low-water mark. However, wherever the straight baselines system has or could be drawn along the coastline, it cannot be said again that the territory of that State ends at the low-water mark, because at that time the water on the landward side of the straight baselines would have become internal waters of Nigeria. In the summary of maritime survey carried out by Martin Pratt and Clive Schofield it is emphasised that Nigeria is entitled, judging from the nature

¹³⁵Supra note 382, at p. 116

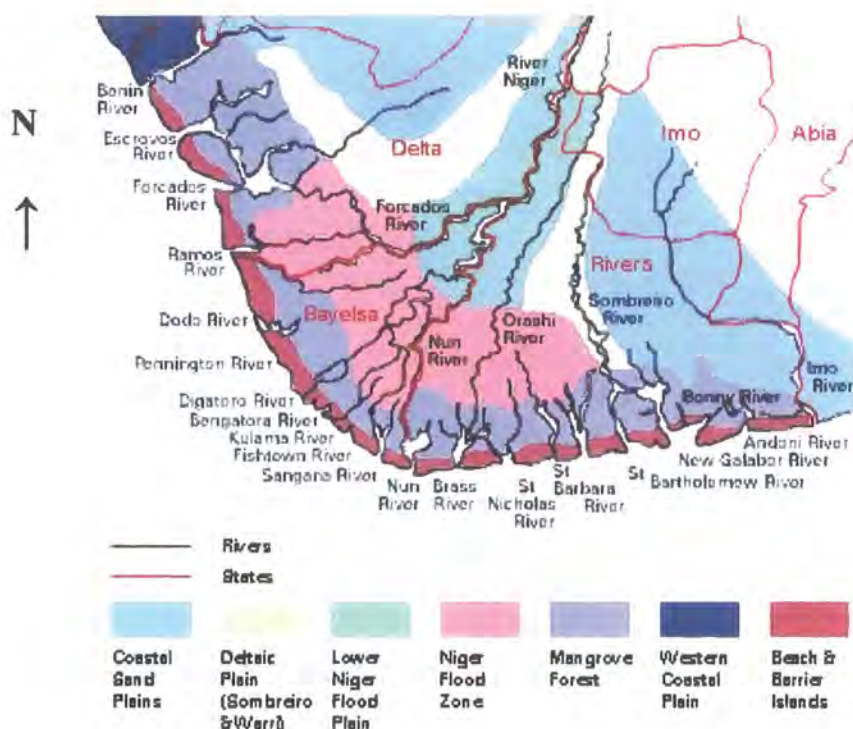
¹³⁶Article 4 (1)

¹³⁷Articles 5 and 7 (1), (2)

¹³⁸Article 7 of UNCLOS enumerates the conditions a coastline should satisfy before straight baseline system could be adopted by a coastal State.

of its coastline to “delimit straight baselines in some of these areas but to date Nigeria has not done so.”¹³⁹ The nature of the coastal areas of Nigeria above is depicted clearly in the map below.

Figure Three: A Map showing the nature of the Niger Delta coast



Source: NDDC Profile.

The court without first considering these conditions and their limitations followed the decision in *R vs. Keyn*. Adoption of the low-water mark as a country’s baselines system does not depend per se on court pronouncements for its existence, but on the nature, geography and the configuration of the coastline of a state. Furthermore, the decision by a country to adopt a particular baselines system is an executive decision and not that of the judiciary. The judiciary can only declare any such baselines

¹³⁹ Pratt, M., Schofield, C., “Jane’s Exclusive Economic Zone,” 2nd Edition (2000 -2001), *Jane’s Information Group*, p. 198

system adopted by a country as either being lawful because of its consistency with international law or unlawful for lack of consistency with it. It cannot recommend that the executive adopt one system over the other. By that decision, the court has adopted the low-water mark to be the country's baselines system, which is a clear usurpation by the apex court of the functions of the executive arm of the Government. By the nature and configuration of the country's coastline, particularly in the Niger Delta areas, straight as opposed to normal baselines system which low-water mark epitomises would have been more appropriate as the starting point for the measurement of Nigeria's territorial and other maritime zones. Geographical configuration is one of the factors that informed the decision by ICJ in the *Anglo – Norwegian Fisheries case*.¹⁴⁰

The implication is that the position taken by the court would prejudice and limit the position, which Nigeria could take in its future conduct of foreign affairs. The judgment also has the capacity to limit and restrict the country's chances of adopting straight baselines in case of future maritime boundary delimitation between Nigeria and its neighbours. However, by not adopting a straight baseline system Nigeria stands to gain in one particular area and this is in not increasing areas that would fall to the FCU in case of any extension in the areas covered by revenue allocation to them. This attitude is a replica of the practice in the United States of America, which has refused to adopt straight baselines to delimit its maritime zones despite the clear need for the same considering the nature of certain segments of its coastline, but has preferred to adopt normal baselines in order to limit the areas of the TS quitclaimed to States by the Submerged Lands Act of 1953.

With regards to question three it could be argued that the Article 5 obligation to indicate low-water line on large scale charts officially recognised by the coastal State is an obligation to all coastal States that have signed and ratified UNCLOS. What the Supreme Court should have done in the case was to have made its pronouncements on the limit of the maritime territory of Nigeria to be dependent

¹⁴⁰ Supra, n. 224

upon Nigeria's formal adoption of a particular baseline system and publication of the same in a maritime chart officially recognised by it or it could have simply stopped at the point of low-water mark leaving the precise determination to cartographers.

A maritime chart is a source of information to mariners. It depicts features such as the location of lighthouses, low tide elevations, mouths of rivers, roadstead, bays and buoys thus providing information on the safety of navigation in the areas covered by the chart. Furthermore, it depicts the depth of particular areas of the sea and any inherent dangers to shipping. It equally depicts the entire maritime space, the configuration and nature of the coastline both of which may enhance Nigeria's chances during delimitation between neighbours and the question of determination of the type of baseline it could adopt in case of delimitation. It is in the light of the above that Article 3 of Geneva Convention and Article 16(1) and (2) of UNCLOS both require States to publish charts depicting their maritime areas and depositing a copy thereof with the Secretary General of the United Nations. The point must be made however that existence of the low-water mark may not depend solely on publication of any chart as held in the Australian case of *Li Chia Hsing vs. Ranking*,¹⁴¹ but the necessity and significance of its publication by a State with unstable or deltaic coastline like Nigeria cannot in any way be ignored.

7. To what extent can the *Abia case* be said to have finally resolved the title problems?

The case, has failed to resolve the matter, first because the judgment itself has been based on foreign decisions from England such as, *R vs. Keyn*,¹⁴² Canada such as, *Reference Re Ownership of Off-shore Mineral Rights*,¹⁴³ Australia such as, *Submerged Lands Case (State of New South Wales and others vs. Commonwealth of Australia)*,¹⁴⁴ *Bonser vs. La Macchia*¹⁴⁵ and United States such as, *United States vs.*

¹⁴¹ ILR, vol. 73, p. 173

¹⁴² (1876) 2 Ex. D. 63

¹⁴³ 65 Dominion Law Reports (2nd ed.) 353; (1967) D.L.R. 2027

¹⁴⁴ (1975) 50 Australian Law Journal Reports, 218

Louisiana.¹⁴⁶ There is nothing wrong for the Supreme Court to rely on foreign cases in order to determine judiciously the matter before it especially, where because of the novelty of the issues involved, there is no domestic precedent to guide the court in the proper determination of the case. In fact, it is almost impossible to determine a maritime case without having recourse to international law or foreign cases. What is wrong is the failure of the court to note that some of those cases are not on all fours with the Nigerian case and that some of them have simply been overruled by subsequent decisions of the court. The background of some of the cases both historically and constitutionally are different from what obtains in the Nigerian case and as a result could not serve as proper guide to the Supreme Court in determining the case.

For example, in the case of *R vs. Keyn*, there are about four important reasons why that case cannot serve as a useful precedent to the Supreme Court of Nigeria in determining the ownership of the maritime space between the Federal Government and the FCU:

The first is that, the dicta in that case which suggest that the territory of England ends at low-water mark were contrary to earlier authorities of (*Benest vs Pipon*;¹⁴⁷ *A.-G. vs. Chambers*;¹⁴⁸ *Gammell vs. Commissioner of Woods and Forests*;¹⁴⁹ *Gann vs. The Free Fishers of Whitstable*;¹⁵⁰ *Duchess of Sutherland vs. Watson*;¹⁵¹) and to later authorities (*Lord Advocate vs. Trustees of the Clyde Navigation*;¹⁵² *Lord Advocate vs. Wemyss*;¹⁵³ *Parker vs. Lord Advocate*;¹⁵⁴ *Lord Fitzhardinge vs. Purcell*;¹⁵⁵ *AG of Southern Nigeria vs. John Holt and Company (Liverpool) Ltd.*;¹⁵⁶

¹⁴⁵ (1969) 122 C.L.R. 177

¹⁴⁶ 332 US 19; 67 US Reporter 1658

¹⁴⁷ (1829) 1 Knapp. 60; 12 E.R. 243

¹⁴⁸ (1854) 4 De G. M. and G. 206; 43 E. R. 486

¹⁴⁹ (1859) 3 Macq. 419.

¹⁵⁰ (1865) 11 H. L. Cas. 192; 11 E. R. 1305

¹⁵¹ (1868) 6 S.C. 199.

¹⁵² (1891) 19 S.C. 174 at 177

¹⁵³ (1900) A. C. 48

¹⁵⁴ (1904) A. C. 364

¹⁵⁵ (1908) 2 Ch. 139.

and *Secretary of State for India in Council vs. Chelikani Rama Rao*¹⁵⁷). The list of later decisions included a decision on the same or very similar issue from Nigeria; it is therefore baffling to note that the Supreme Court could overlook such a decision in *AG of Southern Nigeria vs. John Holt and Company* in favour of an earlier decision which the later decision must be taken to have overruled. The reliance *suo motu* therefore by the Supreme Court of Nigeria on that case is tantamount to complete disregard of the overwhelming precedents on the matter.

Secondly, Gibbs and Stephen JJ have identified another reason in the Submerged Lands Act Case (*State of New South Wales and Others vs. the Commonwealth of Australia*). In that case, the two judges observed that the decision was arrived at by a very narrow majority of 7 judges in support and 6 dissenting, an indication of how divided the court viewed the case and how controversial, inconsistent and unreliable the decision arising from it has been.

Thirdly, the issue that fell squarely for determination in that case was not the issue of ownership of the seabed of the TS *stricto sensu*, but the extent of the criminal jurisdiction of the Admiralty court, which at common law did not extend beyond the low-water mark. Lord Shaw, who delivered the court's judgment in the case of *Secretary of State for India vs. Chelikani Rama Rao*, attested to this fact as follows:

"It should not be forgotten that that case has reference on its merit solely to the point as to the limits of admiralty jurisdiction; nothing else fell to be decided there... When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually, the doubt just mentioned has not been supported, nor has the suggestion appeared to be helpful or sound."¹⁵⁸

¹⁵⁶ (1915) A. C. 599.

¹⁵⁷ *Supra*, note 71

¹⁵⁸ *Ibid*, at p. 224

The fourth reason why the *R vs. Keyn* case cannot serve as a useful precedent in the determination of the seaward boundary of Nigeria and that of the FCU is that, immediately after that judgment, the Imperial Parliament, noting the erroneous impression created by that case enacted the Territorial Waters Act of 1878 to correct the erroneous impression. This Act, applied to Britain and by virtue of Section 7 thereof, it applied as well to her Colonies including Nigeria.¹⁵⁹ If therefore the argument was that the court of Admiralty in England did not have criminal jurisdiction prior to *R vs. Keyn* decision, that Act emphatically refuted the argument by stating that the criminal jurisdiction had always extended beyond the low-water mark. Thus, the jurisdiction of all English colonies where the 1878 Act applied by extension went beyond the low-water mark to at least the three-mile TS claimed by Britain and other maritime powers at that time. The enactment of that Act soon after the *R vs. Keyn* case was decided is indicative of the resentment with which the British Parliament viewed the decision and by that Act, it is reasonable to assume that the decision in *R vs. Keyn* case has been overtaken by it. It is also reasonable to assert that the power exercised by Her Majesty over the TS was not only jurisdictional power but it also included proprietary and sovereign powers.

Furthermore, the Supreme Court in Nigeria relies on the case of *Bonser vs. La Macchia*, yet was not persuaded by the decision in that case, which *inter alia* is to the effect that the Australian states alone may legislate in respect of fisheries in the TS.¹⁶⁰ It is true that legislative competence is a matter distinct from the issue of ownership of the TS, the point is however that, the same Supreme Court which cited and relied on that case still went ahead to award both legislative competence and ownership of the TS to the Federal Government in complete disregard to the case it cited and relied upon.

The United States and the Canadian cases cited and relied upon in the Nigerian case can be distinguished on the following grounds. In the first place, when the United

¹⁵⁹ Chapter 73, vol. 11, LFN (1958), p.399. The Territorial Waters Act, 1878 has now been repealed in Nigeria through the enactment of Territorial Waters Decree of 1967

¹⁶⁰ Supra, n. 234

States colonies became independent in 1776, the concept of TS was but a nebulous concept and even the CS was not yet in contemplation unlike in 1914 when the various colonies in Nigeria were amalgamated, a time when the concept had become widely accepted by the majority of maritime powers. Secondly, the concept of equal footing adopted by the American court in the decision is irrelevant to the Nigerian case. This is so because, the American Federation was established by agreement and the other colonies that later joined after the original states were admitted to the union on an equal footing basis; this is different from the amalgamation of the Nigerian colonies which was done without any agreement and it is doubtful if the concept of equal footing was ever applied to the colonies that were amalgamated.

Furthermore, the Supreme Court in the American cases ruled that the federal authority should have the ownership of the TS for it to protect the nation. This conclusion has drawn the criticisms of Gibbs J. in the Australian Submerged Lands Act Case (*State of New South Wales and Ors vs. The Commonwealth of Australia*) and Frankfurter J in *United States vs. California*, that the correctness of the argument is not self-evident because ownership is one thing and control and power is another: Ownership of the TS in a state would not hinder the control of that area by the Federal authority. Gibbs J continued by repeating the point made by Frankfurter J in the same case of *United States vs. California* that oil under the sea is no more vital to national security than uranium on land. The views of Gibbs and Frankfurter JJ as espoused above received a boost in the opinion of A.V. Lowe in his article,¹⁶¹ and the criticisms of Gibbs and Frankfurter JJ became justified in United States by Congress' enactment of Submerged lands Act of 1953 and in Australia through the enactment of the Submerged Lands Act of 1967, which quitclaimed part of the TS to the states while still retaining the traditional and constitutional roles of the Federal Government in the areas granted.

Furthermore, the reliance of that court on the Canadian case of *Re Ownership of*

¹⁶¹ Gibbs J., "International Law and Federal Offshore lands Dispute", vol. 1, (1977), *Marine Policy*.

Offshore Mineral Rights and the Australian submerged Lands Act case (*State of New South Wales and Others vs. the Commonwealth of Australia*) cannot be substantiated nor could it be justified. Those cases accepted the decision in *R vs. Keyn* without deviation and to that extent cannot be relied on as an authority on the question of determination of the extent of the FCU's seaward boundary or the territorial limit of Nigeria. This view is reinforced by the dictum of Lord Shaw who delivered their Lordships' judgment in *Secretary of State for India vs. Chelikani Rama Rao*. His Lordship's dictum in that case clearly indicates that the *R vs. Keyn's* case decided only the issue of the Admiral's jurisdiction and not the territorial limit of England as some have argued.

To demonstrate convincingly that the dicta in *R vs. Keyn's* case was only on point of admiralty jurisdiction simpliciter, their Lordships cited the cases of *Fitzhardinge vs. Purcell*; *Lord Advocate vs. Clyde Navigation Trustees* and *Lord Advocate vs. Wemyss* which all decided *inter alia* that the territory of the Crown extends and has always extended beyond the low-water mark to the limits of the three miles TS. With all the shortcomings of the case noted above, the question to be asked is: What are the implications of the judgment for Nigeria?

V. Conclusions

In this chapter attempts have been made to trace the genesis of the controversy between Nigeria and its federating coastal units over the ownership of the maritime territory and resources. The Federal Government on behalf of the Nigerian State has grounded its claim to title over the maritime territory on certain domestic laws and also on the provisions of UNCLOS. The domestic laws, it is discovered are unhelpful to the Government's claims, because of the various lacunae in the majority of them. Notwithstanding the identified lacunae, the Federal Government's title remains legally unaffected. This is because the title is protected by the provisions of UNCLOS, which Nigeria subscribes to and which largely governs maritime rights and duties of States.

The reasons adduced by the FCU were similarly examined. These are largely misconceived and contrary to international law, in that the majority of the reasons wrongly arrogate to the FCU the powers that UNCLOS grants to sovereign independent States. This notwithstanding, the argument is made that the FCU by reason of their having lived by and exercised some elements of control over a segment of the sea prior to colonisation and formation of the Nigeria State and by reason of the fact that they are most affected by incidents of oil and gas exploration and exploitation, may use that as argument to negotiate with the Federal Government, but there is no such basis with respect to the EEZ and the CS, which did not exist before colonisation and the formation of the Nigerian State.

Furthermore, it is found out that the controversy is aggravated because of lack of informed knowledge of the principles of the law of the sea which led some eminent Nigerian writers and public figures to equate "State" as used by the Conventions with the coastal units in Nigeria, which are equally referred to as states. This lack of knowledge was equally exhibited by the Supreme Court, in its judgment in *Abia case* through the various errors noted.

As reflected in chapter five, the harshness of the judgment has been considerably whittled down by the Dichotomy Act. The aspects that are not specifically covered by that Act, such as the decision that the territory of Nigeria ends at low-water mark and that it is only the power to exercise jurisdiction that Nigeria possess over the TS still remains a valid judgment of the Supreme Court, which binds all the courts below. For this and other reasons, the judgment of the court in that case cannot be totally supported.

CHAPTER FIVE

Developments within the Nigerian laws since the decision in *Abia case*

I. Introduction

The *Abia case* as noted in the preceding chapter has generated a great deal of controversy, some of which are legal and others political in nature. This chapter therefore undertakes to investigate and examine the legal developments that have arisen since the decision in that case. The chapter begins by the examination of the recently enacted Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act (hereafter referred to as Dichotomy Act), which was enacted following recommendations by a commission set up by the Federal Government to study the judgment in *Abia case*.

Thereafter, the chapter examines the case instituted in response to the enactment of the Dichotomy Act by the Governors of the 19 Northern states.¹⁶² The extent to which that Act may be said to have helped in resolving the dispute and to which the 19 Governors could go in sustaining the suit will be examined. Also investigated is the basis for the recent demands for resources control and the request for implementation of true federalism in Nigeria by the FCU. The various reasons adduced for the demands are examined to ascertain whether they are potent and cogent enough to be capable of divesting the Nigerian state of its title to the maritime territory and its resources conferred upon it by international law.

Similarly explored is the international legal status of federating units of a federal State and whether a return to the practice of what has been termed 'true federalism' by the advocates of the concept could be the basis of a positive right of title to maritime territory and resources in international law.

Lastly, an in-depth examination of the calls by the FCU, particularly, the Niger Delta members of the FCU to self determination will be undertaken. This is with a

¹⁶² 19 Northern Governors and others vs. Federal Government of Nigeria and the Oil Producing states, Supreme Court No. 28/2004

view to determining whether a desire to wrest ownership and control of maritime territory and resources or the failure thereof were sufficient reasons for self-determination in international law and even under the domestic laws of Nigeria.

1. Onshore and off-shore dichotomy and its implications

The first major development that the judgment in *Abia case* brought on Nigeria is that it polarises the Nigerian maritime territory into onshore and offshore areas for the purposes of revenue allocation. The onshore being the waters in the landward side of the low-water line, (internal waters) and the offshore being the waters seaward of the low-water line. This means that the resources derived from the on-shore or internal waters and the land territory would be regarded as being derived within the territory of the FCU concerned and such FCU would be entitled to a share of thirteen percent of any revenue accruing from such resources. On the other hand, the resources derived from the offshore areas would be regarded as not being derived from the territory of any of the FCU, but derived from the Federal maritime territory and the revenue accruing from it belongs in totality to the Federal Government. That is, the thirteen percent share of the FCU would not extend to revenue derived from the offshore activities.¹⁶³ It is important to note that prior to the decision, no such dichotomy existed in the method of revenue sharing between the Federal Government and the FCU. The FCU received the thirteen percent from the revenue accruing to the country from resources mined from both the on shore and the off shore areas of Nigeria's maritime space.

The dichotomy as decided by the court would no doubt have resulted in huge financial losses to some of the FCU, like Akwa-Ibom, Ondo, Bayelsa and Cross River, which possess little or no oil and gas in their onshore maritime areas, but only in the offshore areas which the judgment has now declared belong to the Federal Government.¹⁶⁴ A strict interpretation of the judgment and the report of the committee set up by the Federal Government to study the judgment and to advise it

¹⁶³ Report of the Committee on the Supreme Court judgment on the onshore and offshore suit, submitted on the 23rd of April, 2002, at p.4

¹⁶⁴ Vanguard Newspaper of 18th February 2004, in <http://www.vanguardngr.com>

on its implications would have led to the federating units being asked to refund huge sums of money earlier collected individually by them from the revenue derived from the offshore areas to the coffers of the Federal Government.¹⁶⁵ A quick and humane intervention by the Federal Government, symbolised by the enactment of what is now popularly referred to as the Dichotomy Act has saved the FCU concerned from refunding any sums to the coffers of the Federal Government.

2. The enactment and aftermath of Dichotomy Act

The court's decision attracted almost unprecedented protests by the members of the Nigerian populace, most especially, by the members of the legal profession, the academia and the FCU, who have variously described the judgment as a mere political decision as opposed to a legal one. Therefore, instead of the judgment finally resolving the matter, it in fact escalated it. Sympathy and concern for the FCU over environmental degradation and pollution which oil exploration and exploitation activities have brought on their land led the Federal Government to set up a presidential committee charged with the responsibility of finding an amicable cum political solution to the uncertainty and hardship inflicted by the judgment on the FCU. Membership of this committee was drawn from among the major stake holders and after consultations with the Governors of the FCU to seek their views on the way forward for a political solution to the legal problem.

The report of the committee called for immediate legislative intervention, which would abolish the dichotomy created by the judgment, thereby making resources found both from onshore and offshore as if the same were found within the territory of the FCU. It equally recommended as a long-term measure an amendment to the constitution to reflect the abolition of the dichotomy in the revenue sharing and the various lacunae contained in it, which the Supreme Court judgment has exposed. The main justification for recommending the abolition of the dichotomy in the application of derivative principle has been informed by the consideration that some

¹⁶⁵ See, "Supreme Court Ruling: How Does It Affect the States? In the 'This Day Newspaper of April 8, 2002.

compensation ought to be paid to the FCU for the adverse impact of oil exploration and exploitation activities on the environment as well as the economic activities of the FCU.

In what may be termed partial response to the recommendations of the Presidential Committee, the Federal Government sent a Bill to the National Assembly which sought *inter alia* to define the extent of the seaward boundary from which the FCU could rightfully expect to benefit from the Federation Account on the basis of the 13% Derivation Principle. The Bill defines this zone to be 200 meters water isobaths, which in effect coincides with the Country's 24 nm Contiguous Zone in the Niger Delta areas and less than that limit in places like Lagos and Ogun states. However, the National Assembly amended this provision by inserting in its stead a provision which defined the applicable zone for the purpose of derivation to the full extent of Nigeria's EEZ and CS; this in effect corresponds with the recommendation of the Presidential Committee. The National Assembly's amendment of the Bill led to the refusal by the President to assent the Bill. The President gave among other reasons for his refusal to append his signature to the Bill as amended to turn it to law as including the following:

- (1) That the Bill as amended equates the sovereignty of the (FCU) (in respect of revenue derivation) with that of the Federal Republic and this is to the disadvantage of other non oil producing federating units of the Republic.
- (2) Nigeria is technologically ill-equipped to undertake an accurate and scientific demarcation of its seaward boundaries extending to the Continental Shelf, which in some segments of the coast extends up to 350 nm, let alone doing so among the FCU.
- (3) That even if it was capable of doing so, such an accurate demarcation would involve a probable encroachment on the equally legitimate claims ... of our maritime neighbours – a possible cause of armed conflict.

- (4) That a state (FCU) may cause war with a sovereign country on the basis of its interest in revenue derivable from the Continental Shelf.
- (5) A basic precondition for any claim to maritime sovereignty is that the claimant must be able not only to police, but effectively to defend the territory it claims.
- (6) Most of the offshore exploration of crude oil in which Nigeria is currently involved is carried on within 24 nautical miles of the country's shores. For reasons both of limited funding and the absence, as of today, of any technology capable of mining in such distances from the shore, the situation will remain unchanged for some time to come. Thus the littoral states (FCU) do not stand to gain any increased revenue in the immediate future merely by a legal extension of the zone from which they may derive income.
- (7) Control of territorial waters carries with it the responsibility of monitoring the environmental impact of economic exploitation of such territory, and imposing appropriate penalties on those who infringe our environmental laws, far away from our shores. Nigeria does not now have, and is unlikely to have in the long term, the capability to assess such impact effectively.
- (8) Nigeria under President Obasanjo, has signed an agreement with the maritime and neighbouring republic of Sao Tome, setting up a Joint Development Zone on the EEZ between the two countries. It is likely that a similar agreement will be signed with other countries. The amendment which the National Assembly adopted in the Bill will render such a peaceful approach to the matter academic, and limit the country to the option of war, in defence of the 'rights' of relatively small number of littoral states (FCU), and to the detriment of the non-littoral states.
- (9) But the most dangerous implication of the Bill which the National Assembly passed is the implied right which it confers on a small number of littoral states (FCU) to engage unilaterally in foreign policy making, through presumably direct negotiations with foreign powers and

companies- a prerogative which our Constitution reserves exclusively to the Federal Government; for the right to make such a claim of derivation logically carries along with it the right of negotiation over it.

3. Comments and criticisms on the President's views

Objective examination of the above reasons reveals that while some may be cogent, the majority of them cannot be supported in all ramifications. In the first place, the majority of the reasons enumerated began on the assumption that the insertion by the National Assembly of a clause extending the share of the FCU from onshore revenue to the revenue derivable from mining of resources of the entire EEZ and CS is tantamount to quitclaiming or cession of the zones themselves to the FCU. This is completely erroneous; the purport of the insertion by the National Assembly to the Bill is simply to extend the 13% share of the FCU in the revenue accruing to the Federation Account from activities in the maritime areas to cover revenue derivable from offshore mining and other economic activities. Were that clause retained and approved by the President, it would have returned oil revenue sharing to the status quo that is, covering revenue derived from both onshore and off-shore as it existed in the independence and republican Constitutions of Nigeria. This in effect would not warrant the FCU engaging in any foreign negotiations or adopting foreign policy, which would be contrary to that adopted by the Federal Government.

The Federal Government could control the activities of the FCU as it did during the time revenue sharing by the regions covered resources from both onshore and off-shore – a time when the FCU did not engage in any foreign affairs whatsoever with any country over areas covered by the percentage of revenue paid to them. The Federal Government does all the negotiations, enters into all mining agreements, grants all oil exploration and exploitation licences, police its marine environment and monitors environmental impacts of oil exploration and production, which the FCU are at the receiving end of such impacts and above all adopts all maritime and foreign policies it may deem necessary. All the FCU are entitled to do is to demand for their share of 13% from whatever revenue accruing to the Federal Government

from oil and gas exploration and exploitation covering both onshore and offshore maritime areas.

As a corollary to the above, the extension envisaged by the National Assembly would not in any way affect Nigeria's claims or the claims of other States in the case of maritime delimitation and therefore cannot drag Nigeria to war with any of its proximate neighbours. This is so because the extension that was envisaged by the National Assembly would only help the FCU to share from the revenue that would accrue to Nigeria from every part of the sea that falls under Nigeria's national jurisdiction either as a result of maritime delimitation or from any joint development agreement into which Nigeria may enter. The insertion by the National Assembly would not in any way affect the agreements which the Federal Government has signed or is proposing to sign with any neighbouring country; it may only affect for example the 60% share of the Federal Government from the revenue accruing to the Joint Development Zone Authority (JDZA) put in place by Nigeria and Sao Tome and Principe¹⁶⁶ or to the share of Nigeria in the revenue that would accrue to it in the case of full implementation of the Unitisation Agreement between Nigeria and Equatorial Guinea.¹⁶⁷

By the same token, it is difficult to fathom how the insertion in the Bill that the share of the FCU should extend both to the EEZ and the CS would equate the sovereignty of the FCU with that of the Federal Republic of Nigeria in the matter of revenue sharing. Sovereignty is an international law concept which has to do with the normal compliments of State rights, the typical case of legal competence or in the language of Brownlie, "the legal shorthand for legal personality of a certain kind, that of statehood,"¹⁶⁸ this as discussed above appertains to a State as an entity

¹⁶⁶ Article 3(1), Agreement between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome e Principe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Continental Shelf and Exclusive Economic Zone of the two States

¹⁶⁷ Article 6, Treaty between the Federal Republic of Nigeria and the Republic of Equatorial Guinea Concerning their Maritime Boundary of 23rd day of September, 2000 and Article 1 of the Protocol on Implementation of Article 6(2) of the Treaty between The Federal Republic of Nigeria and the Republic of Equatorial Guinea Concerning their Maritime Boundary.

¹⁶⁸ Brownlie, I., *Principles of Public International Law*, (Sixth ed.), Oxford (2003), p.106

and not to the component units. More importantly the FCU, do not seem to have any other sovereignty outside the sovereignty conferred by international law on Nigeria as a nation – a legal personality over the airspace, the seabed and subsoil of the TS of Nigeria and sovereign and jurisdictional rights over the EEZ and CS.

Furthermore, it is doubtful if the ability to police and defend maritime areas is presently a precondition for a claim to maritime sovereignty. This used to be the case during the cannon shot rule mentioned earlier, but which has since been discarded and taken over by the contiguity and natural prolongation criteria. Claim to either sovereignty, sovereign rights or jurisdiction as the case may be over maritime areas arises in the first instance by the contiguity of a nation to the sea, whether or not that nation has the capacity to police and defend the maritime areas it claims. With respect to TS for example, Lord Arnold McNair in the *Anglo – Norwegian Fisheries case* has observed that the possession of territorial sea by a State “is not optional...but compulsory,”¹⁶⁹ in which case it does not depend on the ability of that State to police and defend it. Furthermore, by virtue of Article 77 (3) of UNCLOS for example, the CS rights automatically attach to every coastal State and do not depend upon any claim or proclamation nor do they depend on the ability of a State to police and defend it. It is the natural appurtenance of the land territory to the sea that confers in the first place the sovereignty which a country possesses over the TS and the sovereign rights and jurisdiction which it ordinarily exercises over the EEZ and the CS. This explains the reason for the comments of ICJ in the *North Sea Continental Shelf case* that;

The principle of the ‘just and equitable share’ if found, contradicted the most fundamental of all the rules of law relating to the Continental Shelf, namely, that the rights of the coastal state in respect of the Continental Shelf that constitute a natural prolongation of the land territory into and under the sea exist ipso facto and ab initio by virtue of sovereignty over the land...¹⁷⁰

¹⁶⁹ Supra

¹⁷⁰ (1969), ICJ Reports at p.22

It therefore follows that if the rights of a coastal state over the CS exist *ipso facto* and *ab initio*, are not optional but compulsory, the same rights cannot necessarily depend on its ability to police and defend it before it can possess it.

Item 6 above is completely indefensible as it overlooks the developments regarding the recent discoveries in Agbami, Bonga and the Erha fields, which are off-shore oil and gas fields. The Agbami oil field, for instance, which lies in block Oil Prospecting Licence (OPL) 216 and which is reputed to rank among the largest single discoveries in deep water in the West Africa sub-region is about 200 km off-shore. In the case of Bonga oil field it is in Oil Prospecting Licence (OPL) 212 and it is about 120 km off-shore, while Erha oil and gas fields, which lies about 1,200 meters of water on oil block 209 are located about 100 miles southeast of Lagos. Efforts at producing from Agbami and Bonga oil fields have reached the stage in which the Production Sharing Contract (PSC) had been concluded, with the Federal Government through the NNPC awarded the largest share. It is expected that by the year 2008 production from Agbami field for example would start with the initial 200,000 barrel per day. Presently, construction of the Floating Production, Storage and Offloading (FPSO) Vessel preparatory to the start of oil and gas exploitation at the Agbami Field has already begun and calls to reduce this long term gestation period in deep water oil and gas exploration and production, which according to the Group Managing Director of NNPC is engendered by high technology equipment, facilities and highly trained manpower needed is being made.¹⁷¹ With regards to Erha field, ESSO Exploration – a unit of Exxon Mobil Corporation has recently announced commencement of production from the deepwater oil and gas field with the capacity of daily production of 210,000 barrels per day. The Erha North oil field, another offshore oil field has just been discovered by Shell Exploration and Production Company (SNEPCO) and when operational, the Erha North will

¹⁷¹ See Kupolokun, F., "Kupolokun canvasses review of gestation period in deep water oil exploration" in *Guardian Newspaper* of 23rd March, 2005 in <http://www.guardiannewsngr.com/business/article03>.

produce an average of 40,000 barrels of oil per day.¹⁷²

When the call materialises, the 2008 gestation period may be further reduced. This again tears to shreds the argument by the President that the area of the sea in which Nigeria is currently capable of carrying out oil and gas exploitation is within 24 nm of the country's shore. Similarly, the argument by the President that the oil producing members of the FCU do not stand to gain any increase of revenue in the immediate future merely by a legal extension of the zone from which they may derive income has also been jettisoned. The statement has been overtaken by the fact that as of today there is in existence technology that is capable of mining in very deep waters and that the question of lack of funds raised by the President is also jettisoned by the example of Agbami Floating Production Storage and Off-loading and the Bonga Oil Field, which are nearing completion stage.¹⁷³ There is no doubt that such a legal extension of the zone would guarantee unto the FCU a substantial share in the amount that would accrue to the Federal Government from the over 1.1 billion US Dollars Agbami Floating Production Storage and Off-loading (FSPO) and the share that would accrue from the 50% NNPC share in the Production Sharing Contract with regard to Bonga oil field. The same is true with regards to the Erha and Erha North oil and gas fields.

While it may be true to assert that Nigeria is technologically ill-equipped to carry out delimitation of its seaward maritime boundaries, the same cannot be said of its financial capability to employ the services of companies that are well equipped with the necessary technology to carry out the delimitation of Nigeria's seaward boundary. This was done in the case of maritime delimitation between Nigeria and Equatorial Guinea, Sao Tome e Principe and Cameroon pursuant to the ICJ judgment in the case between Cameroon and Nigeria with Equatorial Guinea intervening. As a matter of fact, the National Boundary Commission, on behalf of

¹⁷² Vanguard Nigerian Newspaper of 9th May, 2006 in <http://www.vanguardngr.com/articles/2002/business/may06/b09052006.ht>.

¹⁷³ Dr Ojo, (Chairman House Committee on Petroleum Resources)'s comments "Nigeria unhappy about Agbami-Bonga projects" in Vanguard Newspaper of Wednesday, 9th of March, 2005; <http://www.vanguardngr.com/articles/2002/nationalx/nr109032005.html>.

the Federal Government had already begun negotiations on the delimitation of the country's CS and the maritime boundary with Benin Republic.

Furthermore, while it may be true that the Bill as amended by the National Assembly would necessarily involve maritime boundary delimitation between the FCU to determine the amount of revenue realised from the areas appertaining to each of them, this in effect does not warrant its rejection by the Federal Government. This is due to the fact that proper implementation of the 200 metres water isobaths, which the Federal Government eventually adopted would equally warrant such maritime delimitations in order to determine amount of revenue derivable from oil wells found within the areas that appertain to each of them, this therefore brings to nought the argument that Nigeria is technologically ill-equipped to carry out the delimitation or that it would require maritime delimitation between the FCU. At any rate, the Federal Government can opt to retain expression of the power to delimit or not to delimit its maritime boundaries.

The Federal Government has now abolished the dichotomy through the enactment of an Act of Parliament, section 1 of which provides as follows;

As from the commencement of this Act, the 200 meter water depth isobaths contiguous to a state of the Federation shall be deemed to be a part of that state for the purposes of computing the Revenue accruing to the Federation Account from the state pursuant to the provisions of the Constitution of the Federal Republic of Nigeria 1999 or any other enactment.¹⁷⁴

The questions that have cropped up as a result of the enactment include:

- (a) To what extent has the enactment of this Act gone in bringing an end to the dispute between the Federal Government and the FCU over the ownership of the Nigerian maritime territory and its resources?
- (b) If it has not, what shortcomings militated against its success?
- (c) Has the enactment of that Act rendered the Supreme Court judgment in

¹⁷⁴ Allocation of Revenue (Abolition of Dichotomy in the Application of Principle of Derivation) Act, No. 24 of 2004

that case invalid/nugatory?

4. To what extent can the Dichotomy Act be said to have resolved the dispute?

The answer to this question is no. Just as the previous steps taken by the Federal Government to checkmate the controversy between it and the FCU over the ownership of maritime territory have failed to yield the desired results,¹⁷⁵ so also is the Dichotomy Act. That Act has not and may not in anyway settle or abate the dispute; in fact, it has been described by one of the major actors in the controversy – Governor of Delta State, James Ibori as:

A palliative grudgingly granted the oil producing states in order to temporarily arrest the trend towards violent revolt by the masses...we in Delta State will never abandon the struggle for resource control because our losses are far too enormous to be forgotten...¹⁷⁶

His statement was complemented by that of the Chairman of the Senate Committee on Niger Delta, Senator John Bambaifa, who sees that Act, as a good thing in the right direction but that it is not the best. From the way his statement on that Act was framed, it is not difficult to ascertain or fathom the underlying motive or the direction and the line of his thoughts. Referring to the Act, he stated:

“It is not the best if you consider the agitation for total control as demanded by the resource control proponents. But in any struggle, there is no way that you struggle for self-determination in one form or the other that you will attain all that you want at one goal. The sensible person will prefer to struggle, get something out of the struggle first and continue with the struggle later until he eventually

¹⁷⁵ Two major steps were discernible in this respect, the first is the establishment of Niger Delta Development Commission (NDDC) to replace the ailing Oil Mineral Producing Areas Development Commission

¹⁷⁶ See Ibori, J., “Ibori restates call for resource control” in the *Guardian Newspaper* of 22nd April 2004 – <http://www.guardiannewsngr.com/news/article> 16

gets what he wants.”¹⁷⁷

Such statements coming from the mouths of very powerful individuals who wield tremendous political, economic and other influences in the politics, economics and other areas of national life of Nigeria and of the Niger Delta areas in particular would seem to suggest clearly that the Act has not ended the controversy. It merely, though not conclusively addresses the issue of dichotomy in the revenue sharing formula, which is but the tip of an iceberg considering the plethora of demands of the FCU.

In other words, the abolition of dichotomy in the sharing of revenue by the Dichotomy Act is seen by the FCU as merely a step forward in their agitation for the taking of total control of the maritime territory and the resources therein and not an end in itself.

4.1 Shortcomings of the Act

With regards to (b) above, the Dichotomy Act has not resolved title problems because of the following shortcomings:

- (a) it does not for instance address the key question of ownership of the maritime territory or the control of the resources therein and the issue of the seaward limit of the boundary of each of the FCU, which the Supreme Court awarded both the TS and the CS thereof to the Federal Government.
- (b) the enactment of the Act itself is not without procedural irregularities.
- (c) the Act does not address the fears of ethnic minority being expressed by some segments of the Niger Delta, such as the Ogonis, and has failed to make a proper distinction between what

¹⁷⁷ See Bramaifa, J., “Problem of Sea Piracy,” *Vanguard Newspaper* of 8th May, 2004 in <http://www.vanguardngr.com>

has been termed the “true or core Niger Delta areas” and the “not true Niger Delta area,” which are key issues in the agitation for resources control but which have often been forgotten or neglected in most of the efforts at finding lasting and amicable solutions to the dispute.

- (d) the Act is equally silent about the degradation of the Niger Delta environment due to pollution from oil and gas exploration and exploitation.
- (e) the provisions of the Act are not encompassing enough to make the resources of the entire CS to be subject to the principle of derivation.

May be if it had done so, it would have been placatory enough to end or at least abate the controversy. This contention is made manifest by the provisions of section 1 of that Act. In other words, the share of the FCU is limited by that Act only to revenue accruing from the resources mined within the 200-metre water isobaths. There is no question about the fact that the CS of Nigeria extends in the relevant parts far beyond the 200-meter water isobaths being granted by the Federal Government. The depth of 200-metres been referred to varies from country to country depending on the nature of the coastline itself. Even within Nigeria as can be observed from the map below, the depth of 200-meters varies considerably, with most of the FCU in the Niger Delta areas having their 200-meters water isobaths extending well beyond the 24 nm Contiguous zone, but in Cross River, Lagos and Ogun areas, the 200 meters water depth scarcely extend to that limit. This would result in inequity in the application of that Act.

[illegible]

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An Act of National Assembly for the alteration of this Constitution...shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the states.¹⁷⁸

The above procedure was not complied with in the process of enacting the Dichotomy Act for the following reasons:

- (f) there was no proposal to amend the constitution,
- (g) no resolution by the two-thirds majority or any resolution of the Houses of Assembly of all the federating units at all before the Act was passed.
- (h) the enactment of the Dichotomy Act itself was done pursuant to the recommendation of the committee referred to above, which suggested it as a temporary measure pending permanent solution which requires constitutional amendments. The recommendation of the committee can be likened to putting the cart before the horse in that it puts the enactment of the Dichotomy Act first before constitutional amendment, which should legally precede it. The Constitution was thus not amended before the Act was passed and even thereafter the Constitution is yet to be amended to give constitutional validity to the Dichotomy Act.

The irregularities according to Professor Ben Nwabueze (SAN) could “re-open a fresh controversy because the constitutional validity of the Act can be challenged in court.”¹⁷⁹ The irregularities have indeed re-open another round of controversy, in that, the 19 Governors from Northern Nigeria and three of their counterparts from the South West have now instituted a case at the Supreme Court to challenge the

¹⁷⁸ Constitution of the Federal Republic of Nigeria, 1999

¹⁷⁹ See Prof. Nwabueze, B., “Offshore/Onshore oil law illegal” in *The Guardian Newspaper* of 20th February 2004 – <http://www.guardiannewsngr.com/news/article> 10.

constitutionality or otherwise of the extension of the revenue sharing by the FCU to 200 meter water isobaths. Specifically, the plaintiffs argued that the Act itself amounted to “legislative judgment” in that it has by implication ceded that part of the Nigerian coastline and TS contrary to the provisions of the 1999 Nigerian Constitution, the Territorial Waters Act and the Exclusive Economic Zone Act, to the Niger Delta members of the FCU.

Specifically, the plaintiffs claim *inter alia*:

- (a) Whether in view of the provisions of Sections 16 and 44 (3) of the 1999 Constitution, the provisions of Territorial Waters Act, the Exclusive Economic Zone Act it was not ultra vires the powers of the Federal Government to make and implement the Allocation of Revenue Act of 2004?
- (b) Whether having regards to the provisions of Sections 4, 16, 44(3), 162 and 315 of the 1999 Constitution the Allocation of Revenue Act is not unconstitutional, null and void?
- (c) Whether in view of the judgment of the Supreme Court in *Abia case*, the Dichotomy Act is not a legislative judgment thereby making it null and void and without any effect?¹⁸⁰

The Plaintiffs’ argument that by deeming the 200 meter water isobaths to be part of the FCU for the purpose of calculating the amount of revenue that accrue to them amounted to cession of that part of Nigerian maritime space to the FCU cannot be supported in its entirety. Cession is a mode of acquisition of title to territory, which connotes a permanent transfer of sovereignty over a particular territory usually by agreement in the form of a treaty between the grantor (usually a sovereign) and the grantee. It is obvious from the provisions of section 1 of the Dichotomy Act quoted above, which uses the word ‘deemed’ to describe the 200 metre water isobaths which the Federal Government intends the revenue sharing to cover, that it is not

¹⁸⁰ Vanguard Newspaper of 22nd August; see also *The 19 Northern Governors vs. Federal Government of Nigeria and the Oil Producing states*, Supreme Court Suit No. 28 /2004

the intention of that Act to cede or quitclaim the affected areas to the FCU, but to merely deem it as part of the FCU only for the purpose of revenue sharing. No doubt that for all other purposes, the areas in question would not be regarded or be deemed to be part of the FCU. It would be recalled that the 1960 and 1963 Nigerian Constitutions, referred to in the previous chapter used similar word to describe the areas covered by the 50% paid to the Regions that the Constitution deemed the CS to be most contiguous. The court has now dismissed the case without properly marshalling all the issues, including the issues in a – c above and the constitutionality or otherwise of the Dichotomy Ac.¹⁸¹ Thus the Dichotomy Act is still a valid exercise of the National Assembly of Nigeria.

4.2 Has the Dichotomy Act rendered *Abia case* invalid/nugatory?

No, it has not the Act has merely extended the areas of the sea covered by the revenue entitlement of the FCU from the low-water mark that *Abia case* pegged it, but it has not changed the territorial boundary or the seaward limit of Nigeria's national territory, which *Abia case* decided is the low-water mark. The Act has not also changed the power to exercise act of ownership and control of the maritime territory and its resources, which the *Abia case* places on the Federal Government. Thus, the judgment like the Act enacted pursuant to it is still a valid judgment in Nigeria.

II - Intensification in the Demands for Resource Control

The FCU who have all along resented the idea of sharing revenue accruing from such resources on-shore and offshore and have regarded the practice as an unwelcomed imposition by the Federal Government is now to face a reduction in the areas covered by the percentage hitherto paid to them. The decision in *Abia case* is thus seen as an injustice to the Niger Delta people, who bears all the brunt of oil and gas exploration and exploitation. The Dichotomy Act too is seen by the majority of Niger Delta people as not doing enough to remedy the perceived injustice in *Abia case*. The result is a general increase in the tempo of agitation for resources control

¹⁸¹ Ibid

by the Niger Delta people. The agitation itself is taking the form of an unprecedented restiveness and violence in the Niger Delta areas of Nigeria.

To mention only the very recent incidents, MEND, on the 11th January, 2006, kidnapped four foreign oil workers, including one American, one Briton, one Bulgarian and a Honduran and held them captive for nineteen days! The same MEND on the 15th of January, 2006, invaded the Benisede flow station belonging to SPDC, burnt two staff quarters, blew up the oil flow station with dynamite and shot dead 14 soldiers with several other people injured. On the 18th of February, 2006, MEND forcefully took as hostages, 9 foreign oil and gas workers, which included three Americans, one Briton, one Filipino, two Thais and two Egyptians. A bomb explosion occurred at the Bori Camp Army barracks in Portharcourt on Wednesday the 19th of April, 2006 followed within one week by a similar bomb explosion in Warri, Delta state, leaving several people dead and several others injured. On the 10th of May, 2006, an American was shot dead in his car on his way to work by yet unidentified gunmen, while on the 11th of May, 2006, three foreign oil and gas workers were abducted from their car and were not released until the following day. Lately too, eight foreign oil and gas expatriates, 6 Britons, one Canadian and one American were kidnapped by the Iduwini Volunteer Force (IVF) on the 2nd of June, 2006, two of whom were later released on the 4th of the same month. Similarly, militant youths shot dead a Naval Commander, four ratings and two civilians on the 7th of June, 2006, at the Cawthorne Channel River in Port Harcourt¹⁸² and on the 12th of July, 2006, the same militant youths attacked a vessel, which was carrying some supplies to an oil company at Okerenkoko in Warri, killing one Naval Officer and three ratings with several others wounded.¹⁸³ Not relenting, MEND on the 20th of January, 2007 attacked and hijacked a cargo ship and taken hostage the 24 foreigners onboard the ship.¹⁸⁴

¹⁸² Guardian Newspaper of 14th July, 2006 in <http://www.guardiannewsngr.com/news/article01>

¹⁸³ Ibid

¹⁸⁴ Vanguard Nigerian Newspaper of 21st January, 2007 in <http://www.vanguardngr.com/articles/2002/cover/january07/21012007/f321012007.ht>

Thus, production of oil and gas in the Niger Delta Areas of Nigeria is now characterised by incessant ambushing, kidnappings, arsons, bombings and killings of oil and gas and allied workers, blockading of offices and production sites with its attendant restriction of movements, blowing up of oil pipelines and the shutting up of oil flow stations¹⁸⁵ to mention just a few. Furthermore, oil bunkering, which has resulted and is still resulting in major losses of oil revenue by the oil and gas companies and consequently the Federal Government, is argued to be the handiwork of the youth of Niger Delta and in some instances with their foreign collaborators.¹⁸⁶ It has been argued that the militant groups derive the money used in the purchase of arms and ammunitions from oil bunkering. Thus, normal protests, which ordinarily were meant to be peaceful, soon turned violent by the hijacking of the same by the militant youths.

In addition to the activities of the militant youth noted above, major policies of the government and of the oil companies operating in the region regarding the maritime areas including exploration, production and sale of oil and gas are often violently challenged and disrupted by the Niger Delta youth. The most recent examples include the plans by the Federal Government to build a petroleum refinery in Ondo state and the recent plan by the Shell Petroleum Development Company (SPDC) to relocate its operational base from Warri in Delta state to Portharcourt in Rivers state. In June, 2006, the Ijaw Youth Liberty Movement threatened to carry out fresh hostage taking if the case instituted by the Delta state government against the chairman of Foundation for Transparency in Africa was not withdrawn within a

¹⁸⁵ The shutting down of the oil facilities of SPDC by five communities in River state on Tuesday, the 16th of August, 2005 to mention just a few. Chevron Oil Company on the other hand shut its Idama and Robertkiri flow stations in Rivers state because of threats of attack by the militant Ijaw youths and was only able to reopen with the presence of heavily armed soldiers, see vanguard Nigerian Newspaper of 26th September, 2005 in <http://www.vanguardngr.com/articles/2002/cover/september05/26092005/f426092005>.

¹⁸⁶ It is alleged by Shell that 21.9 million barrels per day is lost to oil bunkering. This revelation corroborates the Federal Government's estimation of about 276 billion Naira so far lost by Nigeria; See Vanguard of Nigeria Newspaper of 9th March, 2005 in http://www.vanguardngr.com/articles/2002/niger_delta/nd309032005.html and Vanguard Nigerian Newspaper of 24th August, 2005 in [vanguardngr.com/articles/2002/niger_delta/nd124082005.html](http://www.vanguardngr.com/articles/2002/niger_delta/nd124082005.html).

deadline given by the group.¹⁸⁷ The state of insecurity generated by all the above has led to the recent threats by SPDC to withdraw from further operations in Nigeria¹⁸⁸ and the mass relocation of oil and gas workers to Lagos. The killings and hostage takings seem to have defied all known solutions and they go on unabated.

1. The basis of the agitation for resources control

The agitation is generally hinged on the following criteria:

- (a) Through demand for implementation of true federalism in Nigeria
- (b) Through agitation for self determination

2. Demand for implementation of true federalism

The demand for implementation of true federalism, which hitherto had been a subtle and non-violent affair has now assumed a dimension of national significance by the nature of violence and restiveness noted above and has found a common and uniform expression in the agenda submitted by all the states constituting the FCU, for the national political reform conference, put in place by the Federal Government.

A commentator has for example, regarded recognition of “fiscal federalism” and “regional control of resources” as the only solution in the resolution of restiveness in the Niger Delta area...anything short of these solutions would be an exercise in futility.¹⁸⁹ Professor Sagay in his weekly column argued that “without true federalism Nigeria shall know no peace.”¹⁹⁰ The seriousness with which the Niger Delta people view the issue of true federalism and resources control can be further elicited from the invocation of the spirit of their gods on any of their delegates to the conference that compromised these principles.¹⁹¹

¹⁸⁷ Vanguard Newspaper of 4th June, 2006 in

<http://www.vanguardngr.com/articles/2002/cover/june06/f404062006.html>

¹⁸⁸ See Guardian Newspaper of 12th June, 2004 in <http://www.guardiannewsngr.com/news/article11>.

¹⁸⁹ Ewherido, p., Deputy Speaker, in Vanguard Newspaper of, Wednesday, 9th of March, 2005; <http://www.vanguardngr.com/articles/2002/southwest/sw408032005.html>

¹⁹⁰ See Vanguard Newspaper of 31st December, 2004, pg 28.

¹⁹¹ Vanguard Newspaper of 26th February, 2005 in <http://www.vanguardngr.com/articles/2002/nationalx/nr226022005.html>.

Thus, the agenda of the South West, the South East and the South-South geopolitical zones (the zones in which the FCU rightly belong) were unanimous in their demands for implementation of true federalism in Nigeria. According to them a return to true federalism would guarantee unto each of them not only the right to mine the land based resources found within their territories, but also the right to explore and exploit the resources of the ocean contiguous to their land territories.¹⁹²

However, the position of the South West geopolitical zone as expressed in its agendum for the Conference could be distinguished in one significant respect from that of the South-South and the South East geo-political zones as far as true federalism and resource control issues are concerned. In the true federalism being advocated by the South West, the ocean space beyond the TS would be a matter for international law. Thus it is stated that, “how far a country exercises jurisdiction into the sea is a matter of international law and not even constitutional law. Therefore, by ancillary reasoning, resources which are outside territorial waters can only be a matter for the centre.” Accordingly, the South West geopolitical zone expects that in a true federalism it advocates, “The Federal Government shall continue to control company taxation on extractive and non-extractive industries. This means that while the zones will keep the royalties, the Federal Government will keep the petroleum tax...”¹⁹³

Leaving for later a critique on this argument, it may be noted that the South East on its part did not advocate resource control per se, but called for the re-structuring of Nigeria to six zones, where it expects other zones “to be persuaded by concessions being made to them on revenue allocation and the pegging of the derivation principle to a level that ensures adequate funding of the zones of the North, the Middle Belt, etc.” Top on the agenda of the South-South geopolitical zone on the other hand is resource control and true federalism. Unlike the South West and South

¹⁹² See Alaieyeseigha, D., “abolition of Petroleum and Land Use Acts” in *Guardian Newspaper* of Nigeria of 22nd March, 2004; <http://www.guardiannewsngr.com>.

¹⁹³ Vanguard Newspaper, February 19, 2005, at pp 3 - 6

East zones, the South-South geopolitical zone has made no distinction in its clamour for return to true federalism and resource control between the resources on-shore and offshore of Nigeria maritime territory or between TS and CS. All it wants is the control of all resources in the entire maritime territory adjacent to the Niger Delta areas. Unfortunately, the conference ended abruptly without resolving the thorny issue of resources control and the question of true federalism. The agitation therefore still rages on unabated.

2.1 Federalism/International legal personality and resources control

This aspect of the outcome of both the Supreme Court judgment in *Abia case* and the Dichotomy Act will be examined by an attempt to answer the following questions:

- (a) What is true federalism and what is its relationship with international legal personality? Do the federating units possess international personality, the like of the federation?
- (b) Does true federalism exist in reality? And;
- (c) If it does exist, would a return to true federalism as advocated by the Niger Delta people guarantee to them the right to take over the sovereignty confer on Nigeria as a nation over the TS and her sovereign rights and jurisdiction over the EEZ and the CS?

2.2 True Federalism and the question of international legal personality

This will be examined in the following order:

- (a) Nigeria's understanding of true of federalism
- (b) the relationship between federalism and international legal personality

2.3 Nigeria's understanding of true federalism

In Nigeria, true federalism has been frequently associated with regional autonomy and the control of resources by the regions in which such resources are found. That is an autonomy whereby the federating units possess equal sovereignty with the federation and become independent from it. A type of autonomy that guarantees

each region the power to establish a regional police force and separate parliament and control all resources both on land and at the sea. Thus Pa Enahoro in a paper titled, "Reformed Federalism," the elder statesman dealt exhaustively with what he regards as true federalism for Nigeria. He states that:

we believe that the nationalities of Nigeria are entitled, as their inalienable right, to enjoy a meaningful individualism within the Nigerian family and that the generality of our people are entitled, as of right, to an abundant life for which nature's generous endowments of human talent and material resources more than qualify them..."¹⁹⁴

To buttress and drive his arguments home, the elder statesman quoted extensively some articles of the Constitution of the Federal Democratic Republic of Ethiopia, particularly the preamble, which talks of "nations," "nationalities and peoples of Ethiopia," article 3, which talks of Ethiopian flag and which allows each member state to have its own separate flag and article 3, which talks of recognition of all Ethiopian languages and the authorisation allowing the member states of the federation to determine their respective languages. More importantly, the elder statesman quoted from article 39 of the same Constitution, which guarantees the rights of the individual nations and nationalities of Ethiopia to self determination up to secession, unrestricted right to establish and administer itself and which shall include the right to establish government institutions within the territory it inhabits.¹⁹⁵ The elder statesman did not mince words in canvassing and advocating similar provisions in the true federalism he wants for Nigeria.

True federalism is understood in the context described above by several prominent Nigerians. In the view of former Governor Alamieyeseigha of Bayelsa state for example:

¹⁹⁴ Pa Enahoro "Reformed Federalism" presented at Shell Hall, Muson Centre, Onikan Lagos, Nigeria on the 6th October, 2005 and reported by Vanguard Newspaper of Nigeria under title "Nigeria's False Federalism" on the 11th and 12th October, 2005 in <http://www.vanguardngr.com/articles/2002/politics/october05/12102005/p112102005.html>.

¹⁹⁵ See the Constitution of the Federal Democratic Republic of Ethiopia in http://www.africa.upenn.edu/hornet/ethiopian_constitution.html.

“We need to see federalism in action rather than being a mere phrase to describe our lopsided union. I believe that if the states are allowed under clear federal principles to harness the resources within their territories and to nurture their individual economies according to their peculiar strength, our nation will then be truly bound by freedom, peace and unity.”¹⁹⁶

In the debate about the nature of the political conference, a commentator observes as follows: “It does not matter whether it is sovereign or not we should look beyond the name and think of the need.” He further argues that to us, “it is ...inevitable a debate about the nature of the Nigerian federal system. It is about what should be the degree of power that should be enjoyed by the constituent units, the states or ethnic nationalities.”¹⁹⁷ This question is a very important and controversial question as far as Nigeria and this thesis are concerned. With regards to Nigeria, a determination of what true federalism represents is important because according to Senator Tokunbo Afikuyomi, “the future and destiny of Nigeria are tied to it.”¹⁹⁸ As if to re-emphasise the statement of Professor Sagay above, the Speaker of Delta state House of Assembly – Honourable Pius Ewherido thinks that there will be no solution to the restiveness in the Niger Delta Areas “except government gives recognition for physical federalism and regional control of resources.”¹⁹⁹ Thus the future destiny of Nigeria as a nation and the question of restiveness and control of maritime territory and resources are all regarded as *sine qua non* to Nigeria’s returning to true federalism.

With regards to this thesis, the question is important in that correct determination of what true federalism is all about would assist in the determination of the legal status of the federating units within a federal system of government, in particular the FCU.

¹⁹⁶ Vanguard of Nigeria Newspaper of 13th May, 2004 in <http://www.vanguardngr.com/articles/2002/politics/p313052004.html>

¹⁹⁷ Sam E., (not the Governor of Ebonyi state) in Vanguard Newspaper of 22 February, 2005 in <http://www.vanguardngr.com/articles/2002/politics/p222022005.html>

¹⁹⁸ Vanguard of Nigeria Newspaper of 15th February, 2005 in <http://www.vanguardngr.com/articles/2002/nationalx/nr3150022005.html>

¹⁹⁹ Vanguard of Nigeria Newspaper of 8th March, 2005 in <http://www.vanguardngr.com/articles/2002/southwest/sw408032005.html>

It will equally help in the determination of whether or not it is the Federal Government as opposed to the FCU that possesses the necessary international legal personality to assume ownership of oceanic resources as granted by international law. This importance thus underscores the need for a thorough examination of what true federalism is if it indeed exists.

2.4 The relationship between federalism and international personality

It may be argued that the regional autonomy or true federalism (apart from the extreme approach of some Niger Delta Groups noted below) is meant to be exercised in the context of an internal autonomy of the federating units within the Nigerian federation. There is a problem however when the true federalism is understood to include autonomy of the units over the maritime areas and resources. The problem is this, UNCLOS (article 2 (1)) talks of sovereignty of a coastal State extending beyond its land territory to the TS and a coastal State (articles 56(1) (a) & (b) and 77) as possessing sovereign rights and jurisdiction over the EEZ and the CS. This being the case, the question then arises; which between the federating units and the federation possesses the sovereignty mentioned by UNCLOS and which between the two tiers of government should possess the necessary international legal personality to assume the obligations created by it?

Professor Sagay had occasion to address the issue of true federalism in the context of international personality. In a recent article, the learned professor tries hard to rake up evidence in support of a contention that a Governor of a federating unit (Bayelsa state) under a federal system is entitled to sovereign immunity in the same capacity as the president of the federation itself. In doing so, he concludes that both the federating units and the federation itself possess equal sovereignty and equal international legal personality. In other words, that “a federation’s sovereignty is split between the federal State and the federating units.”²⁰⁰ In reaching the above conclusion, Professor Sagay quoted extensively the definition of federalism offered

²⁰⁰ Vanguard of Nigeria Newspaper of October 14, 2005 in <http://www.vanguardngr.com/articles/2002/politics/october05/14102005/p414102005.html>

by Professor Nwabueze and Whiteman's Digest of International law. Quoting Professor Nwabueze, Sagay says:

Federalism may be described as an arrangement whereby powers within multi-national country are shared between a federal or central authority, and a number of regionalized governments ... In a federation, each government enjoys autonomy, a separate existence and independence of the control of any other government. Each government exists, not as an appendage of other government..... Thus, the central government on the one hand and the State governments on the other hand are autonomous in their respective spheres.²⁰¹

At the international plane, Professor Sagay's conclusion receives support in the first place from the definition of federalism offered by Whiteman's Digest of International Law, which the learned Professor quotes very extensively and which is similar in many respects to that of Professor Nwabueze on the issue that the federation's sovereignty is split between the federating units with each of them possessing equal sovereignty and independence.²⁰²

In the same vein, the split sovereignty spoken of by Professor Sagay is akin in many respects to what the writers on American Federalism in the periods between 1787 and 1788 described as divided sovereignty.²⁰³ This idea of divided sovereignty, which De Tocqueville propagated and which was put in correct legal perspective by the German jurist – Waitz is to the effect that, when states, which hitherto were sovereign and independent in their own right come together and by an agreement form a federal state, they thus individually gave up a part of their sovereignty to the central authority, whilst retaining the parts not given away. According to this postulation, though sovereignty is divided, it is not as a matter of fact qualitatively affected but quantitatively; the sovereignty is no longer a complete sovereignty as it

²⁰¹ Vanguard of Nigeria Newspaper of 14th October, 2005 in <http://www.vanguardngr.com/articles/2002/politics/october05/14102005/p414102005>, p. 4

²⁰² Ibid.

²⁰³ Lodge, H.C., *The Federalist: A Commentary on the Constitution of the United States: being a collection of essays written in support of the Constitution*, 1787, ed. H. Cabot Lodge, 1886. See also, Bernier, I., *International Aspects of Federalism*, London (1973), p.18.

used to be before the entry into the union agreement. The result according to Waitz is that both the central authority and the federating States were sovereign and independent in the spheres retained by each of them.²⁰⁴

Oppenheim, who himself is a supporter of divisible sovereignty, had taken the matter a bit further than Waitz, because while Waitz did not specifically say that the federating units possess international personality, Oppenheim categorically stated they do. After examining the situation with the German Empire after the peace of Westphalia and the establishment of the United States of America and Switzerland as federal states, the learned author was able to distinguish between what he terms partially and fully sovereign states. According to him partially sovereign states, such as the member states of a federation as in the case of Germany, USA and Switzerland and protected states and all states which are under suzerainty are international persons and subjects of international law. Accordingly he stated:

They cannot be full, perfect, and normal subjects of international law there is no doubt. But it is inaccurate to maintain that they have no international position whatever. Once it is appreciated that is not so much the possession of sovereignty which determines the possession of international personality but rather the possession of rights, duties and powers in international law, it is apparent that a state which possesses some, but not all, of those rights, duties and powers is nevertheless an international person.²⁰⁵

The divisible sovereignty highlighted above best describes the type of federation by the United Arab Emirates (UAE), which was first formed into a federation by the coming together of the nine Emirates on February 25th, 1968. Hitherto the Emirates were British protected States who regained their independence in 1971,²⁰⁶ but who later came together to form a federation, first through a treaty but later replaced by a

²⁰⁴ Waitz, I., *Grundzüge der Politik*, Kiel, (1862), pp. 43 – 45. See also, Bernier, (ibid).

²⁰⁵ Jennings R. and Watts, A., *Oppenheim's International Law*, ninth edition, Harlow: Longman, (1992), p. 123

²⁰⁶ Al-Muslemani A.A., "The Legal Aspect of the Gulf Cooperation Council," PhD thesis, University of London, (1989), pp. 48 – 52.

Constitution, No. 1 of 1996. Concerning natural resources, Article 23 of the United Arab Emirate Constitutional Amendment No. 1 of 1996, places the natural resources and wealth in each Emirate as the public property of that Emirate.²⁰⁷ This thus constitutes the first and probably the only known case of federating units' absolute control of maritime resources.

3. The Concept of Indivisible Sovereignty in federal States

Contrary to the views expressed above, some writers have argued that sovereignty in federal States is indivisible and can only reside with either the federating units or the central authority depending upon whether the union itself was established by Treaty or whether after the Treaty of Union, the union decided to replace the Treaty by a Constitutional act. Accordingly the proponents of the view (of which Calhoun and Von Seydel are notable),²⁰⁸ are of the opinion that as long as the Treaty of the union still subsists, the individual federating unit still retains its sovereignty. They argued further that sovereignty is however transferred to the central authority when the federating units decided to replace the Treaty establishing the union with a Constitution. In other words that both the federating units and the federation cannot possess sovereignty simultaneously, it either belongs to one or it belongs to the other.

4. The concept of concurrent sovereignty in Federal States

Another postulation put forward especially by Nawiasky for the explanation of the relationship of federal States and their federating units is that sovereignty is concurrent between them. This according to him is because a federation being a conglomeration of states, sovereignty necessarily rests on all of them concurrently, without any of them being subordinated one to the other. Thus, when the competence of any of the federating units is modified one way or another by the

²⁰⁷ <http://www.helpline.law.com/law/uae/constitution/constitution01.php>

²⁰⁸ Calhoun, "A Discourse on the Constitution and Government of the United States, in *The Works of John C. Calhoun*," ed. R. C. Crallé, Charleston and New York, Appleton (1851 – 81), pp. 111 – 406; Seydel, V., *Der Bundesstaatsbegriff*, in *Zeitschrift für die gesamte Staatswissenschaft*, 28, (1872), 185 – 256

federal authorities, Nawiasski²⁰⁹ argues it is not a violation of their sovereignty since according to him the federation itself must be taken as acting in accordance with the will of the federating units. With respect to international personality, Nawiasski looks on it as a matter purely of competence and that once the central authority has been charged with the exclusive responsibility to conduct foreign affairs on behalf of the federating units, the central authority it is that must enjoy international personality but when the federating units retain for themselves certain aspects of international competence, to that extent, the federating units should be regarded as subjects of international law.²¹⁰

5. The Views of the International Law Commission

The divergence of opinions seen in the above discussions is a reflection of the controversial nature of the relationship between the federation and its component units. The various attempts made by the International Law Commission to resolve the divergence, ended up in producing conflicting reports. Thus in a report on the subject prepared by Lauterpacht in 1953, it was reasoned that treaties concluded by member states of a federation are treaties in the meaning of international law.²¹¹ This means units of a federation which conclude an international treaty are to be regarded as international legal persons. In 1958, another report prepared by Fitzmaurice contained a different view. It stated that in so far as the component units of a federation are empowered or authorised under the Constitution of the federation to negotiate or enter into treaties with foreign nations, even if it is in their own name, they do so as agents for the federation, which alone possessing international personality, is necessarily the entity that becomes bound by the treaty and responsible for carrying it out.²¹² A further opinion was expressed in the 1962 edition of the International Law Commission report, which was edited by Waldock. In that edition, the view was expressed that if the constitution of a federation confers upon its federating units the power to enter into agreements directly with

²⁰⁹ Nawiasski, H., *Der Bundesstaat als Rechtsbegriff*, Tübingen, (1920).

²¹⁰ *Ibid*, p.49; See in particular, Bernier, *op. cit.*, note 284, p.22.

²¹¹ Yearbook of International Law Commission (1953), vol. ii, p.139

²¹² Yearbook of International Law Commission, (1958), vol. ii, p. 24

foreign nations, the federating units in that circumstance are exercising the power in the capacity only as an organ of the federation.²¹³

6. Criticisms against the views

First and foremost, the statement by the South West to the effect that “how far a country exercises jurisdiction into the sea is a matter of international law and not even constitutional law: is partly correct and partly incorrect. It is correct to the extent that the maritime areas and the activities thereon are generally governed by international law, but incorrect, because international law empowers coastal States to enact domestic laws to claim the rights endowed them by it and to regulate marine activities within their areas of sovereignty, sovereign right or jurisdiction. Therefore, domestic laws operate alongside international law on the sea areas within the national jurisdiction. The position of the South West mentioned above reflects a more pragmatic and realistic argument on the matter. This is reasonable considering the argument that the TS formed part of national territory of a coastal State. It assumes (though not conclusively) for example that TS being part of the national territory, a return to true federalism would enable the FCU to have control over the resources of the TS, while the CS beyond the TS being a matter for international law, only the centre, that is the Federal Government could take control of that area on behalf of the entire Nigerian State.

Furthermore, while Professor Sagay’s views on true federalism and divisible sovereignty may be correct with respect to federal States, which specifically share foreign affairs matters with their federating units, it is not completely true with respect to Nigeria and some other federal States where foreign affairs matters are in the exclusive competence of the federal authority. In such States where foreign affairs matters are reserved exclusively for the central authority and the constituent units charged with only certain domestic responsibilities, it cannot be plausibly said that the federating units possess any element of international personality or can be regarded as subjects of international law. This is so for example in the case of

²¹³ Yearbook of International Law Commission (1962), vol. ii, p. 36

Nigeria, where after foreign affairs powers have been exclusively reserved for the central government, what is usually left is domestic matters, which to all intents and purposes would not qualify the units for international personality or make them subjects of international law.

Furthermore, the rights, duties and powers, which could qualify federating units for international personality as proposed by Oppenheim are in reality usually vested in the central government by the constitution. The fact that sovereignty is not divided in the case of the federation of Nigeria is made manifest by the provisions of Section 2(1) of the 1999, Nigerian Constitution, which is to the effect that “Nigeria is one indivisible and indissoluble sovereign State...” It is also on the basis of the above contention that Governor Alamiyeseigha of Bayelsa state of Nigeria was refused state immunity by the High Court in England in *R (on the application of Diepreye Solomon Peter Alamiyeseigha vs. Crown Prosecution Service)*.²¹⁴ This is made manifest in the judgment of the court, which basically relies on the certificate issued by the Secretary of State, to the effect that:

The Federal Republic of Nigeria is a State for the purposes of Part 1 of the Act. Bayelsa state is a constituent territory of the Federal Republic of Nigeria, a federal State for the purposes of Part 1 of the Act. Chief Alamiyeseigha is the Governor and Chief Executive of Bayelsa state and is not to be regarded for the purposes of Part 1 of the Act as Head of State of the Federal Republic of Nigeria.²¹⁵

Furthermore, accepting the views of Professor Sagay would be tantamount to accepting that the federating units for instance and the Nigerian federal State have equal sovereignty, equal international legal personality and that none between the two tiers of government is subordinate one to the other. If Sagay’s proposition were to be accepted, the FCU, it appears would have justification for attempting to wrest ownership of the maritime territory from the federation, whereas in reality this is

²¹⁴ (2005) EWHC 2704 (Admin)

²¹⁵ Ibid.

not the case. The conclusion is thus fraught with some legal uncertainty as to which of the two equal sovereigns should be recognised by the international community as capable of representing Nigeria internationally and which between the two of them should possess the necessary legal capacity to assume ownership and control of the maritime territory and its resources. It is trite law that a State would not be permitted by the other members of the international community to present two faces to them, a federal State is either represented by its central authority or it is represented by the federating units.²¹⁶ Accepting the above views would also be tantamount to accepting one side of an argument to the neglect of others, which sometimes may be overwhelming and probably more credible and compendious. This is so because the learned Professor in holding the views as he did clearly disregards the opinions of other writers and the practice of States on the matter.

Calhoun and Von Seydel's indivisible sovereignty, though it best describes Nigeria's type of federation as can be seen in the provisions of section 2(1) of 1999 Nigerian Constitution, the views can be criticised in various ways. In the first place, by assuming that all federal States came into being through treaty obligations is preposterous and overlooks the situation of some federal states that came into being without any formal treaty obligation, but through colonial impositions, some of which were later ratified by constitutional acts. Nigeria is an example of such States. Secondly, it is preposterous for the learned authors to have assumed that every state that enters a federal union was a sovereign State before entering the union. Experience has shown in Australia, United States, Canada and Nigeria, that some of the federating units were mere colonial appendages before becoming members of the unions. In Nigeria for example all the regions that were joined together to form the federation of Nigeria were either former protectorates or former colonies. Nigeria started as a unitary state, but later transmuted to a federation in 1951. Consequently, the present federating units were not independent sovereign states before the formation of the Nigerian federal union and thus did not bring any

²¹⁶ See Laskin, B., "Some International Legal Aspects of Federalism; the Experience of Canada" in *Federalism and the New Nations of Africa*, Currie edition, University of Chicago Press, Chicago, (1964), p.391.

sovereignty into the union. Thus Calhoun and Seydel's views have been generally discountenanced by several other authors and those who did not discountenance the views like Zorn, Borel and Le Fur are generally of the view that sovereignty in federal States rests on the central authority rather than on the individual federating units.

The concurrent sovereignty it has been argued was accepted, by the then USSR to the extent that the Academy of Sciences of the country wrote a book, where it is stated the Soviet Union is a sovereign State but that "this state of affairs does not reduce or quantitatively affect the sovereignty and independence of each Union Republic".²¹⁷ However, apart from the case of the UAE above, it is wrong to generalise that all member states of a federation were full-fledged States before the formation of a federal union. More importantly, some of the views examined were expressed over a century ago and to that extent have been overtaken by state practice.

7. Practice of Federal States regarding the legal status of federating units

Theory as well as opinion juris have failed to resolve finally the question of the legal status of federating units of a federation. In international law, when a search for a solution to an international legal question cannot be found both in theory and in opinion juris, attention is normally turned to the practice of States which is another source of international law for a possible solution. Therefore, in our search for the correct legal status of the units of a federation vis-à-vis the federation, attention will necessarily turn to the practice of federal States in general. This is seen below at three levels:

- (a) Judicial practice
- (b) Constitutional practice
- (c) Foreign affairs practice

²¹⁷ International Law, an undated publication of the Academy of Sciences of USSR, p. 91; See for a more detailed explanation on the issue in Soviet Yearbook of International Law (1963), pp. 105 -8

7.1 Judicial practice

From the judicial point of view and contrary to the views expressed by some of the theories examined above, sovereignty in federal States is generally regarded as appertaining to the federation as opposed to the various units that make up the federation and thus it is the federation as opposed to the units that possesses international personality.

7.1.1 United States

In the United States for example, a number of Supreme Court decisions have made similar declarations. The court asserted in *United States vs. Curtiss-Wright Export Corporation* - a case which has to do with the question of the foreign affairs powers of the United States that: As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.²¹⁸ Also, the same court in *New York vs. United States* held that 'the states on entering the union surrendered some of their sovereignty'.²¹⁹ The court has also held in *Mackenzie vs. Hare* that as a Government, the United States is invested with all the attributes of sovereignty'.²²⁰

7.1.2 India

In India a similar view as above has been held with respect to the federal State of India. This is in the case of *D. D. Cement Co. vs. Commissioner of Income Tax*. In that case, certain rulers entered into a treaty of union, whereby they agreed to form a union to be known as the Patiala and East Punjab States Union. In a disagreement that followed thereafter, the court held that the treaty was a treaty in the international sense of the term and as a result would not be enforceable in a domestic court. Specifically, the court was of the opinion that:

The agreement embodies the terms on which the rulers agreed and decided to unite or federate and bring into existence a new International Persona (sic).

²¹⁸ 299 US (1936), p. 304 at 318.

²¹⁹ 326 US (1946), p. 572 at 594.

²²⁰ 239 US (1915), p. 299 at 311.

This is one of the circumstances under which a State personality breaks or ceases to exist and the results in such a case are not materially different from those which flow when a sovereign State cedes to or is subjugated by another sovereign State.²²¹

7.1.3 Nigeria

In Nigeria, the Supreme Court in *Abia case* has this to say with regards to the status of the Nigerian state vis-à-vis the federating units:

...Nigeria as a sovereign State is a member of the international community. The littoral defendant States, not being sovereign, are not, either individually or collectively. In exercise of its sovereignty, Nigeria from time to time enters into treaties – both bilateral and multilateral. The conduct of external affairs is on the exclusive legislative list. The power to conduct such affairs is, therefore, in the Government of the Federation to the exclusion of any other political component unit in the Federation.²²²

It is obvious therefore that sovereignty in federal states rests on the State as entity and not on the individual federating units.

7.2 Constitutional practice

It is not only in judicial practice that the federation as opposed to the units is agreed to possess international legal personality and sovereignty; the view is supported by the Constitution of a number of federal States.

7.2.1 Germany

In Germany, Article 32(1) of the German Basic Law²²³ is instructive on the matter. It provides that the foreign relations of Germany shall be conducted by the Federation and where the Länder have power to legislate, they may according to

²²¹ (1955), All Indian Report (Pepsu), 3; See also, (1955), vol. 49, A.J.I.L., p. 573

²²² Supra, p. 589

²²³ 1949 as amended on 20th December, 1993

paragraph (3) of Article 32 conclude Treaties with other States but they must first and foremost obtain the consent of the Federal Government. Further provisions with respect to foreign affairs powers of Germany can be seen in Article 59(1), which empowers the Federal President to represent the country internationally and Article 73(1), which vests in the Federal Government the exclusive legislative powers over foreign affairs matters.

7.2.2 Switzerland

In Switzerland, it is Article 8 of the Constitution; it empowers the Swiss State with “the sole right to declare war and conclude peace, and to make alliances and treaties, particularly customs and commercial treaties with foreign States. By virtue of Article 9 thereof, the Cantons are empowered to enter into treaty relations with foreign states with respect to matters of public economy, frontier relations and police. It may be argued that the two Articles above confer concurrent foreign affairs powers on both the federation and the Cantons but a look at the provisions of Article 18 thereof suggests that before any Canton could conduct any foreign relations it has to go through the Federal Council. This is akin to the German provisions which require the consent of the Federal Government before a Länder could enter into foreign treaty relation.

7.2.3 United States

The case with the United States is similar in many respects to the position in Germany and Switzerland. In this regard, Article 1, section 10, clause 1 of the Constitution makes clear that the constituent states of the Union are forbidden from entering into any treaty, alliance or confederation. However, as in Germany, clause 3 of Article 1 stated that no state shall, without the consent of Congress ...enter into any Agreement or compact with another state or with a foreign power. Article II, section 1 on the other hand gives the President the power to enter into treaty relations on behalf of the United States, while Article VI makes all such treaties under the authority of the country the supreme law of the land. The Articles mentioned have been held by the Supreme Court in *U.S. vs. Arjona* to indicate that

responsibility for foreign affairs in the United States is vested solely in the federal government.²²⁴

7.2.4 Nigeria

With respect to Nigeria, the following matters are contained in the Exclusive Legislative List: Defence (item 17), Diplomatic, Consular and trade representation (item 20), External Affairs (item 26), Implementation of treaties relating to matters on the exclusive legislative list (item 31) and mines and minerals, including oil fields, oil mining, geological surveys and natural gas (item 39).²²⁵ As can be seen, the above are matters connected either directly or indirectly with foreign affairs, their presence therefore in the exclusive legislative list, connotes absence of similar powers in the federating units.²²⁶ Going by the provisions of Section 12 (2), the National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty. In addition to that, Section 4 (4) (a) gives the National Assembly the power to legislate on any matter contained in the Concurrent legislative List and if any law enacted by the House of Assembly of a state is inconsistent with the laws enacted by the National Assembly, such state laws to the extent of their inconsistency shall be null and void.²²⁷

The practice whereby the units of the federation are empowered subject only to the consent of the federation to enter into treaty relation with foreign countries has been argued to confer concurrent sovereignty on the units and thus international personality. This argument may be debunked on many grounds. First, the provisions requiring the consent of the Federal Government before the units could enter into treaty relations with foreign States should be seen as a subordination of the units concerned to the authority of the federation, who may withhold the consent in particular cases. Evidence of such subordination is also seen in the provisions

²²⁴ 120 US 479 (1887. See also U.S. vs. Curtis Wright Export Corporation 299 U.S. 304(1936).

²²⁵ Second Schedule, Part 1, 1999 Nigerian Constitution.

²²⁶ Section 4(2) &(3) of the 1999 Nigerian Constitution excludes the Federating Units from legislating on matters contained in the Exclusive Legislative List

²²⁷ Ibid, subsection (5)

making the laws of the units which are contrary to the laws of the federation to be null and void and of no effect whatsoever.²²⁸

7.3 Foreign Affairs practice

Furthermore, the Foreign Secretaries or Foreign Affairs Ministers as the case may be are usually appointed by the Federal Government and they carry out the foreign or external affairs of the respective States. The federating units in most cases do not possess equivalent power, a single foreign secretary or minister represents the entire State internationally. Furthermore, apart from the isolated cases seen in the former USSR, whereby units such as Byelorussia (now Belarus) and Ukraine became original members of the UN in 1945, it is only the central government that is usually recognised by the members of the international community as possessing this power. Though the isolated cases referred to above might have been done to enhance and widen the political representation of the then USSR in the UN, the action had legal connotation, in that it gave the two units international personality and made them subjects of international law. That practice has now changed with the disintegration of the USSR and Byelorussia and Ukraine each becoming an independent sovereign state of its own. In practice therefore, it is the federation as opposed to the units that is usually saddled with the responsibility for foreign affairs. The statement is equally true with regards to Canada where the situation with Quebec has led to competition over foreign affairs matters.

8. Does one True kind of Federalism exist in reality?

Federalism as practised differs from State to State. In America, which is commonly regarded as an epitome of true federalism, the constituent states' foreign affairs powers are subject to the consent of the Federation, whereas in the former Soviet Union, the member states' foreign affairs powers appeared to be unrestricted. In America the constituent states do not control oceanic resources, except the resources within the one marine league granted the Atlantic and Pacific states and the three marine leagues granted the states along the Gulf of Mexico. The grants

²²⁸ See for example Article 31 of German Basic Law

notwithstanding, the United States still maintains its sovereignty over parts of the TS granted to the states. In some Federal States, such as the UAE, it may be argued that the constituent units are not completely divested of foreign affairs powers. Thus it would appear that though federalism is a system of governance, which best addresses diversity and interests of the minority in any given federal State; it may be an illusion to speak of true federalism.

The International Conference on Federalism, which took place in Brussels, Belgium on the 25th of March, 2005 was confronted with the question of true federalism. The Prime Minister of Belgium, Guy Verhofstadt had this to say on the matter:

One fit-all” federal model does not exist. Each situation requires a tailor made approach, adapted to the needs of a particular cultural, historic and demographic environment. Changing a state’s system is a gradual complex process, which implies giving and taking in a spirit of compromise and sometimes highly technical solutions.²²⁹

The Nigerian former President, Chief Obasanjo, in his paper entitled, “How to Strengthen Federal Institutions” reiterated the fact that there is no true federalism. He stated:

It is my hope that some of the issues raised about reality and practice of federalism in Nigeria will be useful to this conference as we collectively strive for the most transparent, inclusive, tolerant, participatory and democratic political arrangement that can best guarantee democracy around the world.²³⁰

It may therefore be right to conclude on this aspect with the observations of Dr Alex Ekweme, the Second Republic Vice President of Nigeria as follows:

“There is no one formula of what is federalism or true federalism, as Nigerians like to say. There isn’t a true one or a false one. Each country has to adopt or adapt the federal principles according to its own peculiarities...I

²²⁹ Obiawu, “Reconciling contending issues in Nigeria’s quest for true federalism,” *Guardian Newspaper*, 14th march, 2005 in http://www.guardiannewsngr.com/policy_politics/article01

²³⁰ Ibid.

do not think there is any other country in the world with about 350 ethnic nationalities, 140 million people with three large ethnic nationalities; others not so large, and some very small. These are attributes peculiar to Nigeria. Therefore, our federalism must take into consideration the peculiarities of Nigeria's landscape and be tailored to optimise the benefits to the masses."²³¹

In reality therefore, there is no one-fit-all federalism each federal State attempts to formulate its own federalism the way that suits its own peculiarities.

9. Could a return to true Federalism grant a positive right of control of maritime territory and resources on the FCU?

While a return to the type of federalism being advocated by the FCU may, (going by the position of Nigerian Constitution on revenue sharing) warrant the treatment of resources of the TS as being located within the territories of the FCU and hence the extension of their shares to the revenue accruing from those resources. It is however doubtful, if this would have any visible impact on the question of ownership and control of the TS itself and in the revenue and the sovereign right and jurisdiction, which Nigeria possesses over the EEZ and the CS. This is so because the most basic feature of a federal state is that authority over internal affairs is divided by the constitution between the federal authorities and the member states of the federation, while foreign affairs are normally handled by the Federal Government. Both the previous and current Nigerian Constitutions contain provisions delineating the spheres of influence or jurisdiction of the respective governments of Nigeria. For instance, fishing and fisheries other than fishing and fisheries in rivers, lakes, water-ways, ponds and other inland waters within Nigeria fall within the exclusive legislative list of the Federal Government. Similarly, maritime shipping and navigation, mines and minerals including oil fields, oil mining, geological surveys and natural gas²³² all fall within the exclusive legislative competence of the Federal Government.

²³¹ Ibid.

²³² Section 4 (2) of the Nigerian Constitution, 1999; See also Items 29, 36 and 39 of Part 1, Second Schedule of the Constitution, which contains matters falling within the exclusive legislative competence of the Government of Nigeria

Furthermore, the maritime territory of a coastal State is governed to a large extent by international law. Similarly a coastal State is granted the right to legislate on certain specified matters. But because the rights of a coastal State over the various maritime zones derive primarily from international law, coupled with the fact that such rights in the majority of cases involve the interplay of other States and the security of their individual States, maritime territory apart from the isolated case of the UAE has generally been regarded by most States as falling within foreign affairs. In Nigeria as in most other federal States, external affairs fall within the exclusive competence of the Federal Government. Ownership in the FCU of the maritime territory would no doubt entail engagement by the FCU in foreign relations such as entering into Treaty relations with foreign States in case of maritime negotiation and delimitation, international navigation, resource exploration and exploitation. These activities presently fall within foreign matters, which are the exclusive preserve of the Federal government.²³³

Furthermore, it is doubtful if a return to true federalism as advocated with concomitant amendments to the nation's constitution would lead to transfer of the entire federation's interests and authority over the maritime territory and resources to the FCU. This is so because as long as Nigeria remains a federal State; return to true federalism would have little impact on the international law provisions which vest sovereignty over the TS and sovereign rights and jurisdiction on a State as an entity. As long as Nigeria remains one nation, it would be a Herculean or near impossible task to negotiate a constitution which would completely divest the other federating units not being part of FCU of their interests in the maritime territory and resources.

Already, the federating units from the north have opposed the type of true federalism that would warrant control of maritime resources by the FCU. In their agenda to the National Conference mentioned earlier, delegates from the north had maintained that the derivation principle and other variables embodied in section 162

²³³ Item 31 of Part 1, second schedule of the 1999 Constitution

(2) of the 1999 Constitution which are to be taken into account by the National Assembly in the formulation of a law to regulate revenue allocation, should not be tampered with. Secondly, it is their considered opinion that argument for resource control is untenable because according to them, "resources from other parts of Nigeria were used to make the initial investment at the exploration state which ultimately led to the discovery of oil and subsequent exploitation in these areas. Third and most important, that "such argument ignores the universal practice by which it is the nation State and not the component units which exercises absolute control over natural resources."²³⁴ It has also been held that the other federating units from the north are poised to adopting a similar position.²³⁵ Thus the debate on this issue at the conference became so intractable that the conference ended without adopting a particular stance on resource control and true federalism. It is therefore difficult to see how a return to what has been termed true federalism as advocated by the FCU would give them their dream of total control of the resources of the maritime territory of Nigeria.

III - Agitation and the right of Self determination

In recent times, the agitation by the FCU has transcended mere calls for true federalism to calls for self determination. The agitation is gradually assuming an alarming proportion with disruptions of economic activities, (especially oil exploration and exploitation) of the Niger Delta areas by the various interest groups that have now emerged and which are championing the course of self determination of the Niger Delta people. The agitation for self determination in Nigeria is not limited to the Niger Delta people; among the Igbo people in the Eastern part of Nigeria, the Movement for the Actualisation of a Sovereign State of Biafra (MASSOB) has consistently claimed the right to self determination for the Igbo people. The agitation by MASSOB, (which has been regarded in many quarters as a resurgence of events that plunged Nigeria into the civil war of 1967 to 1970) recently led to a public declaration by its members of the independence and

²³⁴ Vanguard Newspaper of Friday, 18th of March, 2005 in <http://www.vanguardngr.com/articles/2002/18032005/f318032005>

²³⁵ Ibid.

sovereignty of the Igbo people from the Federal Republic of Nigeria with headquarters in Aba. However, while the reason for the agitation by MASSOB centres basically on supposed marginalisation of the Igbo as a people in the scheme of things in Nigeria, the agitation by the Niger Delta people has to do mainly with the ownership and control of the maritime territory and its resources.

The activities of MASSOB have influenced in no small measure the current agitation by the Niger Delta people, because some of the federating units that make up the Igboland are equally oil producing states and as a result partake in the clamour for control of the maritime territory and its resources. The question that needs to be examined in this context is the extent to which the Niger Delta people including their Igbo component can avail themselves of the rights to self-determination either under international law which governs the principle or whether such rights are contemplated by the domestic laws of Nigeria.

The interest groups within the FCU, particularly in the Niger Delta area could be divided into four with each of them possessing its individual aims and objectives. On this basis it will be easier to explain that while some of the groups are in favour of external self-determination of the Niger Delta areas outside of the framework of the Federal Republic of Nigeria, others are not so interested.

The first among the interest groups is the group of politicians and government officials, some of whom have occupied or are still occupying or are jostling to occupy exalted governmental positions at either the federal or state levels. This group to which the South-South Peoples Assembly may be categorised does not favour disintegration of the Nigerian state per se and if they did, they have been passive about it and would rather prefer that the Niger Delta continues to remain an integral part of the Nigerian state where they would continue to have the opportunity of aspiring to any level in the government of the country. To continue to play a key role in the scheme of things and as far as their interests are continued to be protected, they would favour one Nigeria. Members of this group span all

cadres of politicians and other government officials (both past and present). This group worked very hard to ensure that the South-South geopolitical zone produced the next president of Nigeria, in the April, 2007 general elections, but succeeded only in producing the Vice President.

The second group comprises the indigenous non governmental organisations (NGOS). This group consists of activists and critics whose main concern as in the first group is not the disintegration of the Nigerian State per se, but require a 'negotiated agreement' for the continued existence of Niger Delta (FCU) in Nigeria, whereby the people of that region would have a 'fair deal' of whatever benefits are derivable from that region. This explains the reason for the unflinching support the group has lent to the calls for the convocation of Sovereign National Conference by the Government of Nigeria. Being composed of active and restive youths, this group has been in the forefront in showing its anger, disenchantment and resentment about the attitude of the oil companies operating in the Niger Delta areas and in the sensitisation of the people of that region and the international community and the powers that be at the federal level to the devastation of their rivers and farmlands by the multinational oil and gas companies, who according to the group, usually spend money in order to get into a community for oil drilling but leave after the exhaustion of the oil in that area without any visible developmental impact in the community.²³⁶ The group has complained bitterly too about what they considered the seeming insensitivity of the government to the pollution of the Niger Delta environment through oil exploration and exploitation. The group comprises the Ijaws both at home and abroad and recently have embarked upon international protests to draw the attention for example of the British Prime Minister, the Foreign Affairs Secretary, the British Parliament, the European Union, the Secretary General of the Commonwealth and the Representative of the United Nations in the United Kingdom to what has been termed economic exploitation and ecological

²³⁶ See the Vanguard Newspaper's exclusive interview with the leader of Ijaw Youths (the Egbesu) in the issue of 8th May 2004 in www.vanguardngr.com

warfare on the Ijaws and other Niger Delta nationalities.²³⁷ It is their desire that the Federal Government should show more concern for their plight and also curb its military excesses by restricting it from what has been termed incessant killings of Ijaws openly, secretly and extra-judicially.²³⁸ Also, that the Multinational Oil and Gas Companies should use the type of international standards they have applied and are still applying in other advanced petroleum producing countries to control the pollution and other degradation of their environment.

The third group includes those who do not want the FCU to continue to remain in Nigeria. The Ijaw Republican Assembly and the Movement for the Survival of Ogoni People (MOSOP) for example belong to this group. To this group, the FCU have not received their fair entitlements from what accounts for well over 80% of the revenue of Nigeria derivable from 'their land'. To them therefore, once they cannot get what they rightly deserve from what they termed 'their wealth', it would be right for them to go "our different ways none violently as a nation."²³⁹

The fourth group has similar ideology and views with the third group; they are however different in their modus operandi. While the third group believes in non violence in achieving the independence and sovereignty of the Niger Delta from the Nigerian state, the fourth group is well armed, more militant and has oftentimes adopted an arms struggle to achieve that purpose. To this group belongs the Niger Delta Peoples Volunteer Force (NDPVF) and the Niger Delta Vigilante. Recently too, the Movement for the Emancipation of the Niger Delta (MEND) could be added to the list. Their revolutionary ideologies are similar in many respects to those of the arms wing of the African National Congress and the Irish Republican Army. This group has persistently agitated for self determination of the FCU in the form of total independence and sovereignty from the Nigerian State through the use of force. The group is in the forefront in the campaign for resource control. Its

²³⁷ Ibid, of 10th March, 2006.

²³⁸ Ibid.

²³⁹ See Ighodaro, "Dokubo Spits Fire," in Vanguard Newspaper of Nov. 20, 2004, www.vanguardngr.com/articles/2002/cover/f320112004.html, p. 3.

modus operandi has drawn the attention of Nigerian Government at a time when the group threatened to blow up oil pipelines and demand the order for the oil companies operating in that region to vacate within a deadline set by it. The Government was forced to enter into dialogue with the leaders of some of the groups to the neglect of some others. This has led other groups that did not initially believe in violence to achieve their objectives to think that the only language that would probably draw the attention of Nigerian Government to hearken to their demands for self determination and resource control is the resort to the use of force.

It is obvious from the interpretation and the way and manner of the usage of the concept of self determination by MASSOB and other interest groups that they both lack a clear and proper understanding of the meaning and scope of operation of that concept. This therefore, calls for a proper elucidation of the concept. It is hoped that in doing this, the above mentioned groups and any other like minded groups or individual in Nigeria would take that opportunity to apprise themselves with the true meaning and the scope of operation of self determination. This would enable them to assess the legality or otherwise of their actions before embarking on them.

1. The meaning and scope of self determination

The concept, of 'self determination' is now so widely used that Cassese considers it as having attained the status of a "general principle of international law."²⁴⁰ It is equally recognised by State practice (though still controversial) as a basic principle of international law, to which even the status of *ius cogens*, has been attributed.²⁴¹ It is also this importance that led the ICJ to describe the principle in the *East Timor case* as an obligation *erga omnes*²⁴² and in the *Western Sahara Opinion* it accepted it as forming part of customary international law.²⁴³ It was against the backdrop of this importance that self determination found its way into the corpus of international

²⁴⁰ Cassese, A., *Self Determination of Peoples: A legal reappraisal*, Cambridge, (1995), at pp. 171 – 2. See also Doehring, K., 'Self Determination', in B. Simma, ed., *The Charter of the United Nations: A Commentary* Oxford University Press, (1994), at p. 70.

²⁴¹ Malanczuk, P., *Modern Introduction to International Law*, (Seventh ed.) London, (1997) p. 327

²⁴² East Timor Case (Portugal vs. Australia), (1995) ICJ. Reports, 90

²⁴³ (1975) ICJ Reports, p.12 para. 56.

law, first and foremost as an anti colonialist standard, secondly as a ban on foreign military occupation and lastly as a requirement that all racial groups be given full access to government.²⁴⁴ However, these lofty aims of self determination have changed radically over the years from the original intention of the founders; it has now become a weapon used by a number of tribal minorities to unilaterally secede or agitate to secede from the parent State. This is exactly the case in Nigeria where a desire to control maritime resources is now being pursued under the guise of self determination. Whether or not this is possible in international law and even under the domestic laws of Nigeria is a matter to be considered.

2. Sources of right of self determination

Self determination as a principle can now be found in a number of international Conventions and resolutions, among which the following are notable: The principle is explicitly mentioned in Articles 1(2) of the UN Charter and implicitly mentioned in Articles 55, 73 and 76(b) of the same Charter dealing with colonies and other dependent territories. It has also found its way into the ICCPR²⁴⁵, Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the General Assembly in 1960,²⁴⁶ International Covenant on Economic, Social and Cultural Rights²⁴⁷, United Nations General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations (hereafter Declaration on Principles of International Law), which perhaps appears to be the one that contains the most far reaching and important provisions on self determination. It stipulated that the principle of equal rights and self determination of peoples includes the right of all people 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development' and the duty of every State 'to respect this right in accordance with the provisions of the

²⁴⁴ Cassese, A., *International Law*, Oxford University Press (2001), p.106

²⁴⁵ Article 1, 999 U.N.T.S. 171

²⁴⁶ Resolution 1514 (XV) of 14 December 1960.

²⁴⁷ Article 1, 993 U.N.T.S. 3.

Charter'.²⁴⁸ Others include the UN Conference on Human Rights which adopted the Vienna Declaration and Programme of Action,²⁴⁹ African Charter on Human and Peoples Rights²⁵⁰ and the UN General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.²⁵¹ Another international legal document that has recognized the right to self determination is the Final Act of the Conference on Security and Co-operation in Europe.²⁵²

The methods of achieving self determination envisaged by the above documents, particularly the Declaration on Principles of International Law, include for example, establishment by the peoples concerned of a sovereign and independent state, the free association or integration with another state and the choice of any other political status freely accepted by the people. The choices mentioned above, particularly the establishment of a sovereign and independent state, association or integration with another state and the emergence into any other political status freely determined by a people have been severally interpreted to constitute a right to external self determination by the peoples concerned. The above influenced the clamour for self determination by the people of Niger Delta and the MASSOB in Nigeria. The question therefore is whether or not the above statements could be interpreted to mean the existence of a right to external self determination in international law. There are those that argued that the statements constitute a right to external self determination and those who argued it is not.

It should be noted however, that the documents mentioned while recognising the right of peoples to self determination, majority of them contain qualifications, which are supportive of the fact that the exercise of such a right must be sufficiently limited to prevent threats to an existing State's territorial integrity or the stability of relations between sovereign States. For example, the Declaration on Principles of International Law provides that States shall refrain from any action aimed at the

²⁴⁸ General Assembly Resolution 2625 (XXV), 24 October, 1970.

²⁴⁹ A/Conf. 157/24, 25th June 1993

²⁵⁰ Article 20

²⁵¹ General Assembly Resolution 50/6, 9th November 1995.

²⁵² Part VIII, 14 ILM 1292 (1975) (Helsinki Final Act).

partial or total disruption of the national unity and territorial integrity of any other State or country. Added to that, the United Nations General Assembly's Declaration of the Fiftieth Anniversary of the United Nations, by providing that member States will:

....This shall not be construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind...²⁵³

Similarly, the Final Act of the Conference on Security and Co-operation in Europe, states in part VIII that:

The participating States will respect the equal rights of peoples and their right to self determination, acting in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states.²⁵⁴

Furthermore, after principle 4 of the concluding document on the follow up Meeting to the Conference for Security and Co-operation in Europe confirmed that the people always have the right in full freedom to determine, when and as they wish, their internal and external political status, principle 5 on the other hand states that the participating States:

will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or

²⁵³ Op. cit., n. 251

²⁵⁴ Op. cit., n. 252

situations in contravention of this principle will be recognised as legal by the participating States.²⁵⁵

Lastly on this point, the Declaration on Principles of International Law provides that:

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent States conducting themselves in compliance with the principle of equal rights and self determination of peoples...²⁵⁶

The participating States are committed to respecting the equal rights of peoples and their right to self-determination only when the peoples concerned conduct themselves or act in conformity with the purposes and principles of the Charter of the United Nations, especially with regard to territorial integrity of States. This is a clear declaration of opposition to external self-determination in the sense that would dismember or obliterate the territorial integrity and political independence of the parent State. This presupposes that international law expects that the right to self determination should be exercised by peoples within the framework of existing sovereign States and consistently with the maintenance of the territorial integrity of those States and not that those States possessed the right of secession from the existing State.

However, the Declaration on Principles of International Law quoted above, contains another parallel statement, which requires States to conduct themselves in compliance with the principles of equal rights and self determination. This is similar to a paragraph in the United Nations General Assembly's Declaration of the Fiftieth Anniversary which requests States to conduct themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of

²⁵⁵ Conference for Security and Co-operation in Europe – Follow –up Meeting, 4th Nov. 1986 – 19th Jan. 1989; See <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>.

²⁵⁶ Op. cit., n. 248.

Government representing the whole people belonging to the territory without any distinction of any kind. The clause has been severally interpreted to support the existence in international law of a right to external self determination. It is argued that a right to external self determination in the form of secession exists in international law, when a State has failed to conduct itself in compliance with the principle of equal rights and self-determination and cannot provide a Government that is representative enough to accommodate the whole people belonging to the territory without any distinction. That a right to external self determination must be available to a people when they are blocked from the meaningful exercise of the right to self determination internally, they should be entitled, as a last resort, to exercise it by secession.

Apart from the above, the Supreme Court of Canada in *Reference re Secession of Quebec* noted that there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised “externally”, which, according to that court would potentially mean secession. The court identified those under colonial rule or foreign occupation as falling within the category of peoples entitled to external self-determination. According to the court, this entitlement is based upon the assumption that both classes make up entities that are inherently distinct from the Colonialist Power and the occupant Power and that their territorial integrity, all but destroyed by the colonialist or occupying Power, should be fully restored. The last category identified by the court is where a people are subject to alien subjugation, domination or exploitation outside colonial context.²⁵⁷ This last category finds support in Article 55 of the UN Charter and under the Declaration on Friendly Relations mentioned above. A principle of the Declaration on Friendly Relations for example states as follows:

..Every State has the duty to promote, through joint and separate action, the realisation of the principle of equal rights and self determination of peoples, in accordance with the provisions of the Charter, and to render assistance to

²⁵⁷ See judgment of 20 Aug., 1998, http://www.uni.ca/rule_law.html; ILR (Lauterpacht and Greenwood), vol. 115, p. 536 - 539

the United Nations in carrying out the responsibility entrusted to it by the Charter regarding implementation of the principle, in order:

- (a) To promote friendly relations and co-operation among States; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

Bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principles, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations...²⁵⁸

The question now is, whether the control of maritime resources, which forms the basis of the agitation for self-determination by the Niger Delta people fall within the category noted above? Secondly, whether the circumstances guaranteeing external self-determination could avail MASSOB of a unilateral right of secession from Nigeria? The answer to the two questions above is negative for the reasons elaborated below.

3. Why the Niger Delta people may not claim right of external self determination.

The following reasons are responsible for why control of maritime resources cannot be ground for a positive right to external self determination of the Niger Delta people:

- (a) The Niger Delta people are not under any colonial bondage, not under any foreign occupation and are not under any alien subjugation as determined by the *Reference re Secession of Quebec*.
- (b) Furthermore, the Niger Delta people are not the victims of attacks or abuses on their physical existence or integrity, or of massive violation of their fundamental human rights, above all they are not an oppressed people. Their fundamental rights and their right to participate and aspire to the highest level of governance are all guaranteed and protected by the provisions of the Constitution on Fundamental Human Rights.²⁵⁹ In the legislature, citizens of the Niger Delta are represented at both the National Assembly and the House of Representatives in accordance with

²⁵⁸ Op. cit., n. 248.

²⁵⁹ Sections 14, 15 and the entire provisions of Chapter IV of the Constitution of Nigeria, 1999

Sections 48 and 49 of the Nigerian Constitution of 1999. Section 48 for example provides that three Senators will be elected from each state, while Section 49 on the other hand provides that ...the House of Representatives shall consist of three hundred and sixty members representing constituencies of nearly equal population as far as possible, provided that no constituency shall fall within more than one state. Within the executive, the Vice President of the Republic, Inspector General of Police, the Secretary to Federal Government of Nigeria and the chief of Army Staff to mention just a few are from the Niger Delta areas.

(c) It cannot also be said that the various ethnic nationalities in the Niger Delta areas have been denied or are being denied the ability to exert internally their rights to self-determination.

(d) Nigeria as a sovereign and independent State can be argued to be conducting itself in accordance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction. This presupposes that the right to external self determination will not avail the Niger Delta people on the basis of resource control *simpliciter*.

(e) One of the main reasons for the agitation for resources control and self determination by the Niger Delta people is that the decisions of the Supreme Court in *Abia case* led to a general reduction in the revenue payable to them and in some cases to a need to refund revenues earlier collected by some of them. The Federal Government through the Dichotomy Act has now out of magnanimity extended the share of the FCU to cover revenue derived from resources of the TS and in some cases to resources within the Contiguous Zone. Some federating units that were supposed to refund moneys earlier collected have been prevented from doing so by the enactment of that Act, therefore the basis of the agitation if any has been pre-empted by that Act.

(f)The agitation itself may be argued to be contrary to Section 2 (1) of the 1999 Constitution, which provides that, Nigeria is a one indivisible and indissoluble Sovereign State to be known by the name Federal Republic of Nigeria. Not only is the agitation contrary to international law, it also finds no support in Nigeria's domestic laws. This is the crux of the entire argument, as both the Niger Delta people, the MASSOP and even the Yoruba people in the South West of Nigeria agree that as the Nigerian State was not brought into existence originally by the agreement of the various nationalities that were amalgamated in 1914, and the federation superimposed on them in 1951, there is no legally binding obligation that could prevent any of them from seceding. This argument may be debunked on the basis of the fact that the Constitution itself is a product of the joint actions of the various nationalities and may be regarded as binding on all of them.

With regards to MASSOB, their agitation for self determination is not based on control of maritime resources *stricto sensu*, but on perceived marginalisation of the south-east geopolitical zone mainly dominated by the Ibos in the scheme of things in Nigeria. What constitute the alleged marginalisation has not been specifically spelt out in concrete terms by MASSOP, thus the doubts still persist as to how the Ibos are marginalised. Is it that the Ibos are being prevented from asserting their internal right of self determination, which in this case connotes, a people's pursuit of its political, economic, social and cultural development within the framework of Nigerian state, hence their agitation to assert it externally? Or is it that the Ibos are been marginalised in terms of distribution of Nigeria's wealth or in terms of physical development of the federating units constituting the south-east geopolitical zone or are being prevented from aspiring to the highest level of governance in Nigeria?

While in terms of numerical strength, homogeneity of language and culture the Ibos may qualify as a people entitled to the right of self-determination in the eyes of international law, it cannot be plausibly said that they are being denied by the Federal Government or anybody at all of access to government. The Ibos freely

make political choices, have the right to vote and be voted for any political office in Nigeria and freely without any hindrance from any quarters whatsoever pursue economic, social and cultural development within Nigeria and throughout the whole world. In terms of representation in government, the Ibos are equitably represented in the legislative, executive and judicial organs of the Nigerian government. The culture of the Ibos epitomised by their language and traditional heritage are given the prime of place in all institutions in Nigeria. For instance Igbo language is widely adopted as one of the three major National languages, spoken in all national networks (radio, television etc) and included in the national curriculum taught in schools across the country and the cultural heritage which is widely exhibited and enjoyed all over the country.

MASSOB like the Niger Delta groups noted above could equally be said to represent only a fragment of the population of the Ibos, as a result it can be argued not to represent the views and aspirations of the entire Igbo nationality. This calls to question the legitimacy of the agitation itself, which in all ramifications does not represent the views and the generality of interests of the entire Ibos, the majority of whom do not share or believe in external self determination or in the modus operandi of MASSOB in securing it. It is therefore difficult to envisage how the right to external self-determination can be sustained on the basis of our second question above.

If the agitation by MASSOB is based on the second question, that is marginalisation in terms of distribution of wealth and physical development of Igbo land, it is doubtful if that alone even if proven could ground a positive right to unilateral secession. In the first place, the distribution of Nigeria's wealth among the constituent federating units is a constitutional matter undertaking equitably in accordance with the provisions of the Constitution.²⁶⁰ It has never been tested in any court in Nigeria that the authority charged with the responsibility of distributing the national wealth of the country has at any time deliberately withheld or reduce

²⁶⁰Section 162 (2) of Nigeria's 1999 Constitution

portions due to the Igbo people for whatever reason. Above all however, the Friendly Relations, it could be argued does not envisage self determination in the form of external self determination. This fact could be elicited from the provision which states that, nothing shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self determination of peoples.

IV. Conclusions

In this chapter, developments in Nigeria's domestic laws since the Supreme Court of Nigeria's decision in *Abia case* have been examined. It is found that the decision led to an unprecedented condemnation by majority of Nigerians and that it is the timely intervention of the Federal Government, that prevented some members of the FCU from being asked to refund to the coffers of the Government large sums of money earlier received by them from the federation's account, the sums which the decision in that case has rendered their collection illegal. The intervention it is discovered is in the form of setting up of a commission of enquiry to study the decision and to recommend to the Federal Government the best way to cushion the hardship necessitated by it.

The enactment of the Dichotomy Act, following recommendation by the commission of enquiry is the first legal approach adopted by the Government to cushion the hardship. Since this Act has the implication of altering certain provisions of the 1999 Nigerian Constitution, it can only be legally enacted after an amendment pursuant to section 9 of that Constitution had been carried out. The process of examining this aspect of the Dichotomy Act reveals that no constitution was amended before the Act was enacted and passed to law. This and many other shortcomings of the Act already noted constitute a fatal error, which has further generated another round of controversy and a court case. As a result the Dichotomy Act though still a valid legal exercise of the Legislature, it cannot be said conclusively to have resolved or abated the title dispute over the Nigeria's maritime

space and its resources.

Thus, the title dispute, which had hitherto raged softly between the Federal Government and the FCU, suddenly assumed the dimension of violence and demand for total resources ownership and control by the FCU. A further examination of the demand for resources ownership and control reveals that the demand is hung on two principal legal concepts. The first is the constitutional law concept of federalism and the second is the international law concept of right of self determination. For example, the concept of federalism is examined in relation to international legal personality of federating units and in relation to what is termed by the FCU 'true federalism'. The federating units can possess international legal personality and control maritime territory and resources when the constitution expressly confers such powers, it is however difficult to argue that a federating unit possesses such powers where no express provisions of the constitution conferring such powers upon it. Even in the few countries where the federating units possess some elements of international legal personality, there is marked differences in its exercise. In some of these States, exercise of such powers is still generally subject to the overall consent of the Federal Government before they could be exercised. Notwithstanding, international legal personality of a federating unit in most cases does not extend to the maritime areas and their resources. The case of the UAE that has been examined is an isolated case and even then, it is still the UAE that UNCLOS addresses and not the various Emirates that constitute it.

There is no such concept as 'true federalism' or a 'false federalism'. Practice of States as exhibited by their legislative, judicial, executive and foreign affairs practices reveals a marked differences in the practice of federalism. This been the case, a return to the type of federalism advocated by the FCU will still not help their campaign any better, because, while the practice of the type of federalism advocated may warrant control by FCU of the land territory, it may not warrant such control over the maritime territory, which is largely governed by international law.

Lastly, the thesis examines the legality or otherwise of the demands and claims to entitlement to right of self determination by the FCU and other similar groups in Nigeria. It also examines the criteria of internal and external self determination and the preconditions for the exercise of both rights and whether a desire to wrest ownership and control of maritime territory and resources could legally be pursued or subsumed under the right of self determination. Investigations into the various reasons put forward to justify entitlement to the right of self determination reveals a glaring lack of understanding on the part of the FCU of the distinction between external and internal self determination and the conditions required for the exercise of each of the rights. Apart from their desire to wrest ownership and control the maritime territory and resources, the FCU and other similar groups have failed to show any legal justification for the exercise of external self determination. A desire to own and control maritime territory and resources does not fall within known legal criteria stipulated by international law for the exercise of right of external self determination.

Chapter Six

5. Experience of some federal States

I. Introduction

Attempts have been made to examine the dispute over the maritime territory and resources of Nigeria. The conclusion was *inter alia* that, in spite of all the efforts the dispute still rages on and is gradually assuming an unprecedented and dangerous dimension and that if not properly managed, it may result in the disintegration of the country as a united country. It is against this backdrop that this chapter focuses on the experience of some selected federal coastal States particularly those that had contested at one time or the other ownership and control of the maritime territory and resources with their federating units. It is intended to examine how the affected federal coastal States have succeeded in resolving similar disputes in their various maritime domains, with a view to extracting some lessons for the final and amicable resolution of similar dispute in Nigeria.

In this regard, an in-depth examination will be conducted on the practical approaches adopted by the United States, Australia and Canada in resolving or at least abating their maritime title disputes.

II. United States experience

1. Genesis of the problems

This development can be seen in three perspectives: The first is the individual rights of private persons, the second is the rights of individual federating state and the third is the rights of the Federal Government.

1.1. Individual rights of private persons

Before colonialism, indigenous system of property rights existed both on land and on the adjacent sea areas. By this method, the Indians and other natives exercised individual right of property owners over the land and on the adjacent sea areas. These rights as noted earlier were subsumed under the British system of alienable fee simple by the various land reforms that were carried out against the Indian

natives on colonization of the American continent. At this time too the Crown registered several grants that were made prior to colonization and made several other grants of lands including lands under navigable waters to individuals who held titles as proprietors. Individual proprietorship over land and the adjacent sea areas is exemplified by the grants made to Martin by the successors to the colonial proprietors in *Martin vs. Waddell*¹ and similar ones made in *Pollard vs. Hagan*.²

1.2. Take over of individuals' rights by the federating states

The second stage is the stage by which the states began to take over the individuals' land and maritime rights. This was the case immediately after the US Supreme Court's decisions in *Martin vs. Waddell*.³ In that case a grant was made to Martin by the state of New Jersey, which after the American Revolution became the successor state to the Crown's governmental authority. The defendant – Waddell on the other hand derived his title from the successors to the colonial proprietors. In an ejection case that followed thereafter, the Supreme Court was invited to determine the question whether the beds of navigable water bodies were returned to the Crown as part of governmental power or retained by the proprietors as part of the land. It was held that the thirteen original states, because of the sovereignty acquired through the revolution against the Crown, owned the lands under navigable inland waters within their territorial limits, and that each subsequently-admitted state acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission. Similar decisions were made three years later in the case of *Pollard vs. Hagan*,⁴ based on the equal footing doctrine, which the Court says subsequently-admitted states enjoyed. Thus, the Supreme Court extended the doctrine by laying the foundation of individual states' ownership of the beds of certain non-inland waters.

Armed with the above decisions, the American coastal states took control of not

¹ 41 US (16 Pet) 367 (1842)

² 44 US (3 How) 212 (185)

³ *Supra.*, n. 1

⁴ *Supra.*, n. 2

only the internal navigable rivers but also the three mile TS. The states gradually took over the former rights of the individual coastal land owners first, through the enactment by California of the Exploration and Leasing Act of 1921. By this act California wrested from the individual coastal land owners the leasing of coals, petroleum, oil shale, gas, phosphate, sodium and other mineral deposits.⁵ It equally asserted proprietary rights in the lands, issued a number of grants of title to submerged lands to some of its governmental organs and also to the Federal Government, regulated fisheries and applied the state criminal law within the three mile TS which it believed it owned.⁶ California's action was subsequently followed by other states through the passing of similar legislation by Texas and Louisiana indicating their purported ownership of the offshore areas.⁷

The actions of the states in assuming ownership of the maritime territory was actively supported by the Federal Government through the seeking of title from the states each time it needed a portion of the maritime territory. It is equally on record that the Department of Interior had on several occasions turned down applications made to it by producers for license to prospect for oil and gas off the coast of California and instead directed that such applications be made to the states.⁸ Thus, the authority of the states, which the two cases mentioned above initially conferred on them over the maritime territory off their coasts, was further legitimised by the action of the Federal Government. Therefore, for over a century (1842 when the decision in *Martin vs. Waddell* was delivered to 1947 when the first California decision was delivered), the coastal land owners and subsequently the states exercised unfettered authority over the adjacent maritime territory with the active acquiescence of the Federal Government.

⁵ California Statutes 1921, ch. 303 para. 1, p. 404.

⁶ See *United States vs. California* (supra) 332 US 19, 91 L. Ed. 1889 (1947); Kingston, R.I., *The law of the Sea (Third Annual Conference)* (1968), p.90.

⁷ Louisiana Act 55 of 1938; 2 Garmel's Laws of Texas 1461; Bartley's Texas Digest, art. 1631, 1634.

⁸ Reed, M.W., *Shore and Sea Boundaries*, The United States Government Printing Office, Washington, (2000), vol. three, p. 5. A Congressional Committee was provided with 21 such decisions of Interior. Senate Committee on Interior and Insular Affairs, S.J. Res. 20, 82nd Cong., 1st session, p. 562. See also Swarth, G., "Offshore Submerged lands," vol. 6, (1968) *Land and Natural Resources Division Journal*, (US Department of Justice), p. 109, 112

1.3 Take over of states' rights by the Federal Government

The third stage began when disquiet arose within the Federal Government circle as to whether the judgment of the Court in the two cases above could be interpreted to cover all navigable waters, especially waters beyond high and low-tide lines. As a result, judicial, legislative and practical measures were adopted by the United States in resolving the title problems.

2 Judicial approaches to the resolution of the title problems

Following President Truman's proclamation of September, 1945, in which he asserted the claim of the United States to the exclusive right of exploitation of the natural resources of the subsoil and seabed of the CS appertaining to the United States, the Federal Government in October the same year instituted as a test case an original action at the Supreme Court of United States against the state of California, to determine the dominion over maritime territory and mineral rights under the three-mile belt of sea off the Californian coast. The claim of the United States was predicated principally upon two grounds, the first of which is its "right and responsibility to exercise whatever power and dominion that are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean." Secondly that "proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and land under it."

On the other hand, the state of California raised three defences, one that, its constitution, which she adopted in 1849, included a three-mile offshore belt as part of its territory. Secondly, that the boundary was ratified by the Enabling Act that admitted California to the Union. Thirdly, California relied heavily on the equal footing doctrine enunciated in *Martin vs. Waddell*⁹, *Pollard vs. Hagan*¹⁰ and their

⁹ Supra., n. 1

progeny and argued that the original states had entered the Union with TS and that it must have done so too. The Court discountenanced the California arguments and upheld those of the United States and decreed that:

“The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in and full dominion over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of inland waters, extending sea-ward three nautical miles...The state of California has no title thereto or property interest therein”¹¹

The rationale for the decision of the Court is informed first by its understanding that the states could not have entered the Union with TS, because according to it, “in 1776, the year America got her independence from Britain, the idea of a three-mile belt over which littoral nation could exercise rights of ownership were but a nebulous suggestion. Neither the English charters granted to this nation’s settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a 3-mile ocean belt for colonial or state ownership.”¹² That “at the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a 3-mile water belt along its borders.”¹³

It is not totally correct to state that there was no settled international custom regarding TS around the periods before and shortly after American independence in 1776. In 1793 for instance, the American Secretary of State - Jefferson was reputed to have made the first United States’ official claim to TS. This was followed in 1794 by an Act of the United States Parliament, which adopted the three mile rule for purposes of neutrality during the war of the coalition.¹⁴ Therefore, from that period onward to the Supreme Court’s decision in *Martin vs. Waddell and Pollard*

¹⁰ Supra., n. 2

¹¹ United States vs. California (1947) 332 US 804, 805, 92 L. ed. 382, 383, 68 S. Ct. 20, Order and Decree

¹² Ibid, at p. 32.

¹³ Ibid.

¹⁴ Neutrality Act of 5th June, 1794

vs. Hagan and beyond, the idea of three mile TS over which a littoral State exercises right of ownership became a common maritime practice in the United States. It is therefore difficult to fathom why the same Supreme Court that ruled in *Martin vs. Waddell* in 1842 that the original states acquired title to the maritime territory beneath their navigable waters, (generally regarded at that time and beyond as including the three-mile belt of TS) and later in *Pollard vs. Hagan* in 1845 that subsequently admitted states enjoyed the same right under equal footing doctrine, had suddenly turned to deny the same right in 1947 when the decision in *United States vs. California* was made.

By the same token, it would seem that the length of time (over one hundred years) for which the states have been allowed to exercise the right of ownership over the three-mile belt was long enough to found a prescriptive right of ownership in them or for the Federal Government to be taken as having acquiesced or slept over its rights by its failure to protest the exercise of acts of ownership by its federating states but instead actively encouraged and supported states' title. In the *Anglo-Norwegian Fisheries case* for example, 50 years was held to be long enough for Britain to be held to have acquiesced to the straight baselines practice of Norway and in the *Rann of Kurt case*, 25 years was held to be sufficient.¹⁵ It is clear however from the pleadings that acquiescence was not specifically pleaded by California during the trial.

The victory recorded in the California case encouraged the Federal Government to institute further actions against other American coastal states in what has come to be regarded as the Tideland cases. The state of Texas was the next target, thus in *United States vs. Texas*, the Federal Government repeated its earlier claims in the California case against Texas. Texas on the other hand presented a uniquely different and previously unconsidered legal question for the court to determine. It stated that it was neither an English colony nor an American territory prior to its admission into the Union and that before it became a member of the union it was a

¹⁵ (1968) ILM vii, 633

sovereign independent State, which was proclaimed as such in 1836 and was subsequently recognized by the United States and the community of nations. As a result of the above, Texas contended that it had sovereignty over marginal sea prior to its admission into the Union and that the submerged lands below were among those “vacant and un-appropriated lands” that the republic had specifically retained at statehood when the Federal Government refused to assume its liabilities.

The court held however on the basis of “equal footing” and national interest principles that even a state previously possessing both *dominium* (ownership) and *imperium*” (governmental powers and sovereignty) over its marginal sea as an independent sovereign lost that authority upon entry into the union.¹⁶ That, “[a]lthough *dominium* and *imperium* are normally separable and separate; this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty”¹⁷ in favour of the Federal Government. The paramount principle relied upon by the court in the above cases was explained further by it in its judgment in *United States vs. Louisiana case*. The court stated in that case that:

“The marginal sea is a national, not a states’ concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defence, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.”¹⁸

The same reasoning as above was applied in *United States vs. Maine*¹⁹ and in all other subsequent submerged land cases decided by the Supreme Court. The question is what is national interest? Frankfurter J described in *United States vs. Texas* mentioned above as something less than fee simple title. It could also relate to national security, trade and commerce, maritime resources and other interests, which the sea is reputed to possess, held in favour of the Federal Government.

¹⁶ 339 US, (1950) at p. 719.

¹⁷ Ibid.

¹⁸ 339 US 699, 704 (1950).

¹⁹ (1975) 420 US 515 77

Not only is the above reasoning applicable to all the coastal states in the United States, the same reasoning has been held to be applicable also to the Indian aboriginal tribes²⁰ and recently, it has been extended by the United States District Court to cover a former Trust territory in *Commonwealth of the Northern Mariana Islands vs. United States of America*.²¹ On appeal to the United States Court of Appeal for the Ninth Circuit, that court while upholding the District Court decision equally followed the Supreme Court decisions in the previous submerged land cases. It held that, in upholding the declaratory judgment sought by the United States as against sovereignty of Commonwealth of Northern Mariana Islands (CNMI) over the TS, the court noted that the United States possesses “paramount rights in and over the waters extending seaward of the ordinary low-water mark on the coast and the lands, minerals, and other things of value underlying such waters;” and that the CNMI’s “Marine Sovereign Act” including the Submerged Lands Act” are preempted by Federal law. The Court went further to explain that the paramount doctrine upon which the judgment is based draws its authority from the inherent obligations placed on the sovereign governing entity to conduct international affairs and control matters of national concern....that once low-water mark is passed the international domain is reached.²² Thus, the authority of the Federal Government of United States over the submerged land areas seaward of the low-water mark became firmly stamped and institutionalised.

The decision of the court in the *CNMI case* could be understandable to the extent of its having been delivered at a time when international law had clearly clarified the authority of coastal States over their maritime areas and also because of the Section-By-Section Analysis of the Covenant to Establish the CNMI, which clearly placed CNMI under the sovereignty of the United States. It can therefore be argued that the Court in arriving at the decision as it did was merely relying on the provisions of

²⁰ *Native Village of Eyak vs. Trawler Diane Marine, Inc.*, 154 F. 3d 1090, 1092-95.

²¹ Civil Action no. 99-0028 ARM of 7th August, 2003. See < <http://www.Amid.uscourts.gov/documents/decisions / CV-99-0029-55 pdf> >

²² *Ibid*; *California vs. U.S.*, 332, U.S. at pp. 35 – 36 and *Native Village of Eyak*, (*ibid*)

both the Geneva Convention and UNCLOS, which unambiguously placed sovereignty over the TS and sovereign rights and jurisdiction over CS upon the State as an entity and not on the individual federating units in federal States. We therefore see in the cases of California, Texas and Louisiana the inter-play of customary and public laws as opposed to the conventional international law that applied in the CNMI case. Thus it could be argued that the cases were decided at that time based on the rapidly evolving customary international law on CS. Similar argument could be made with respect to the enactment of both the Submerged Lands Act, 1953 and the Outer Continental Shelf Lands Act, which came into being pursuant to the Truman's Proclamation of 1945.

The Supreme Court's judgment as seen in the above cases has recently been reaffirmed in *State of Alaska vs. United States of America*. This is with respect to certain pockets and enclaves known as Alexander Archipelago, which are located more than three nautical miles off the southeastern coast of Alaska. The court refused to award the islands to Alaska because, the waters in question on account of their locations more than three nautical miles off the coast did not qualify as inland waters (so as to give rise to a presumption of state title to these submerged lands) under either of the state's two theories concerning (i) historic inland waters, and (ii) juridical bays; and (b) thus, instead qualify as TS, so that the state had no valid claim of title to the disputed pockets and enclaves.²³ The islands were awarded to the United States because of their locations more than three nautical miles off the coast; if they were located within the three nautical miles, they would probably have been awarded to the State of Alaska as a consequence of the Submerged Land Act, which (a) confirms and establishes the presumption of state title to lands beneath navigable waters within the boundaries of the respective states, and (b) establishes the states title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States.²⁴

²³ US Supreme Court Reports, (2005) 162, L. Ed. 2nd, p. 57 – 8

²⁴ Ibid, p. 59

2.1 Analysis of judicial practice

The Supreme Court as seen in the above cases granted United States priority rights over the maritime territory. The worrisome aspect is the exclusion of the CNMI from the ambit of the Submerged Lands Act grants. Although the CNMI it may be argued, is not a state per se, like the other American states but a mere self governing territory under the sovereignty of the United States, it is difficult to fathom or explain the rationale of the court in not extending or making the provisions of the Submerged Lands Act 1953 to be equally applicable to it as has been done to California and other coastal states. This is so because the CNMI entered into a political union on February 15th 1975 with the United States, which indicated that upon termination of UN Trusteeship Agreement, the CNMI would become a self-governing commonwealth in political union with, and under the sovereignty of the United States of America. One would expect that the newly established relationship should put CNMI in equal footing with the other states of United States so that it too would be entitled to the grant of three nautical miles of TS. There is force in this assertion if consideration is taken of the “Section-By Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands” of February, 1975, prepared by the Marianas Political Status Commission to accompany the Covenant, it reads as follows;

[t]he United States will have sovereignty, that is, ultimate political authority, with respect to the Northern Mariana Islands. The United States has sovereignty with respect to every state, every territory and the Commonwealth of Puerto Rico. United States sovereignty is an essential element of a close and enduring political relationship with the United States, whether in the form of statehood, in the traditional territorial form, or as a commonwealth.²⁵

The above clause by placing CNMI under the sovereignty of the US might no doubt informed the decision of the court in that case, the argument can still be made that even if as a self governing entity under the sovereignty of the United States the Submerged Lands Act could not possibly apply to CNMI or that it cannot enjoy

²⁵ Op. cit., n. 21, p.12

equal footing rights because it is not one of the federating states of the US, this alone should not deprive the islands from being granted three miles TS on other considerations. Its status as a self governing territory under the sovereignty of the US should have been enough to earn her equal treatment like other coastal units. The Section-by section Analysis noted above has been declared authoritative by the court of Ninth Circuit in *Fleming vs. Department of Public Safety*.²⁶

3. The practical measures leading to the final resolution of the dispute

3.1 Reference to Special Master

What are of the utmost significance to the subject of this chapter are the pragmatic approaches adopted by the United States to resolve the dispute between the Federal Government and its coastal federating units. Certain major steps are noteworthy in this regard. The first is in the late 1940s, after the Supreme Court ruled in the California and Texas cases that the United States and not its federating states was, and always had been, the owner of submerged lands underlying its TS, the court referred the determination of the precise location of the boundary between state-owned and federally-owned lands along the coast of each federating state to a Special Master appointed by it. The Special Master was also to take evidence and make recommendations, setting a precedent which has been followed in numerous subsequent cases.²⁷ The reports of the Special Master especially with regards to California identified three pertinent issues for resolution but the US Congress intervened before any action was taken on them.

3.2 Delimitation of areas quitclaimed

Delimitation as a practical measure was undertaken as will be shown below after the quitclaiming made by the Submerged Lands Act of 1953. Therefore, for there to be a proper ascertainment of areas appertaining to each state, delimitation exercises were carried out between adjacent states to determine the boundary of the areas

²⁶ 837 F. 2d at 408

²⁷ Reed, M.W., Koester G.T. and Briscoe J., *The Reports of The Special Masters of the United States Supreme Court in the Leading Submerged Land Cases (1947 – 1987)*, Landmark Publishing Co., California (1991) p. xi

appertaining to each of them; this action led to another round of court cases, with which we are not presently concerned.

3.3 Enactment of the Submerged Lands Act of 1953

The intervention of the Congress in the title problems took the form of a legislative approach and this was done shortly before the Supreme Court could address all the exceptions that were raised by the parties to the recommendations by the Special Master and before any further action was taken on the reports of the Special Master. Thus in May 1953, the United States Congress took a very decisive step consistent with its earlier but botched attempt at legislation to resolve the problem by enacting the Submerged Lands Act of 1953.²⁸ That Act grants to the states “title to and ownership of the lands beneath navigable waters within the boundaries of the respective states.”²⁹ Section 3 thereof is very instructive on this, it provides as follows:

- a. It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable state law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective states in which the land is located, and the respective grantees, lessees, or successors in interest thereof.
- b. (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all rights, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources.³⁰

²⁸ 67 Stat. 29 (1953) 43 U.S.C.A. § 1301 – 15 (1964)

²⁹ Ibid, para. 3 (a)

³⁰ Submerged Lands Act 43 [USC §.1311]

Section 4 on the other hand defines the seaward boundary of each original state as a line three geographical miles distant from its coast line or in the case of the Great Lakes, to the international boundary. The section equally extends the grant to cover subsequently admitted States, who could now extend their seaward boundaries to three geographical miles or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by the boundaries. The same section recognises and affirms the possibility of some states extending their seaward boundaries beyond three geographical miles if such has been provided for by its Constitution or law or has been previously approved by the Congress. This last requirement generated another round of judicial interpretation between the United States and the other Gulf states with the State of Texas³¹ and Florida³² respectively emerging as the only states in the Gulf of Mexico held to be entitled to the three marine leagues. The other Gulf States of Louisiana, Mississippi and Alabama were held to be entitled only to three geographical miles like their counterparts in the Atlantic and the Pacific Oceans.

The constitutionality of the provisions of this Act was challenged in the *Alabama vs. Texas case*. The court refused to grant the motion by Alabama and Rhode Island to file bills of complaint to challenge the right of certain states to hold properties ceded to them by the Federal Government under the Submerged Lands Act. In refusing the motion the court relied principally on the provisions of Article IV, Section 3, clause 2 of the Constitution of the United States, the article that confers on the Congress the power to quitclaim areas to the states.

Furthermore and to accommodate the concerns of the Federal Government, especially as it affects commerce, navigation, national defence and international affairs, the Submerged Lands Act reserves to the United States all constitutional power of regulation and control over areas in which proprietary interests of the states are recognised and retain in the United States all rights in submerged lands

³¹ 363 U. S. at 37, 58 – 64, 4 L. Ed 2d at 1049, 1061, 1062, 1064 – 65.

³² 363 U. S. 121, 128, 4 L. Ed. 2d 1096 at 1101 (1960)

beyond those areas and extending seaward to the limit of the CS.³³ Apart from the natural resources within the areas quitclaimed to the states, the Federal Government still retains its traditional and constitutional rights of control over commerce, navigation, national defence and international affairs in those areas.

3.4 Enactment of Outer Continental Shelf Lands Act, 1953

The next legislative step taken to redress the dispute was the enactment of the 1964 Outer Continental Shelf Lands Act,³⁴ which declared that the United States owned all submerged lands and resources in the CS seaward of the lands granted to the states. This Act clearly distinguishes states' submerged lands from the submerged land areas appertaining to the United States.

4 Comparison with Nigeria's Constitution

Nigeria's 1999 Constitution, lacks similar provisions as in Article IV, section 3, clause 2 of the US Constitution, thus the National Assembly of Nigeria lacks similar powers of quitclaiming under the constitution. This grave omission has opened up a channel for the criticism of the enactment of the Offshore Dichotomy Act, which the Senate enacted without any constitutional basis to extend areas of the sea covered by the revenue sharing of the FCU. Thus the Dichotomy Act will continue to remain unconstitutional until the necessary procedures have been adopted. This also militates against the use by Nigeria of the methods employed by the United States in resolving its maritime dispute with the states unless Nigeria overhauls or carries out a major amendment to its Constitution to grant the National Assembly similar powers.

III The practice of Australia

1 Genesis of the problems

Australia shares similar experience with the United States in that both States were former British Colonies and are Federal States. Both States are equally coastal

³³ 43 U.S.C.A. §§ 1302, 1314 (1964)

³⁴ 67 Stat 462, 43 USC § 1331 et seq.

States sharing similar experiences of dispute over the ownership of the maritime territory and its resources they contain between the Federal Government and the federating units. Similarly, it can be argued that the two States have taken remarkable steps towards final resolution of the dispute. Unlike the United States however, dispute over Australia's maritime territories emanated in the first place over fisheries as opposed to dispute over ownership of the petroleum resources off the coasts of some federating units in United States.

The dispute as in the United States can be viewed in two perspectives of individual state and federal government rights.

1.1 Individual state rights

The exercise of fishery rights in the Australian TS by the states derives from the provisions of Section 51, subsection (x) of the Commonwealth of Australia Constitutional Act of 1900. That section reserves 'Fisheries in Australian waters beyond territorial limits'³⁵ to the Commonwealth thus, impliedly reserving for the states the fisheries within territorial limits. By virtue of these provisions Australian states exercised control over fisheries within the three-mile TS while the Commonwealth exercised its control beyond that limit throughout to the CS.

1.2 Take over of States' rights by the Federal Government

The enactment of the Seas and Submerged Lands Act by the Australian Parliament in 1973 marked the beginning of attempts by the Federal Government to appropriate the rights of the states over fishery within the territorial limits of Australia. Section 6 of this Act vests in the Crown in right of the Commonwealth the sovereignty over the territorial sea, the airspace, sea-bed and subsoil thereof. Section 10 on the other hand vests sovereignty over the internal waters of Australia in the Crown in right of the Commonwealth. The Act by its section 14 preserves the rights of the states in respect of waters within any bay, gulf, estuary, river, creek, inlet, port or harbour, the superincumbent airspace and the subjacent sea-bed and

³⁵ 63 and 64 Vict. C. 12, s. 51 (x); the section of the Constitution referred to is supported by Section 6, part II of the Australian Seas and Submerged Lands Act, no.161 of 1973

subsoil thereof, which before federation were, and which still remain within the sovereignty of a state: the superincumbent air space and subjacent sea-bed and subsoil thereof. It equally reserves for the states offshore fishing but this also is subject to any subsisting extraterritorial limitations.

With respect to the continental shelf, Section 11 declared that the sovereign rights of Australia as a coastal State in respect of the continental shelf for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth. By these provisions, the Seas and Submerged Lands Act has taken away the former rights of the Australian states in the TS and arguably the internal waters. It may therefore be argued that the problem of ownership of maritime territories in Australia emanated, first from the aforementioned provisions of its Constitution, which fails to state in a clear and unambiguous language what constitutes 'territorial limits' thus opening up the channel for disputation as to what in reality constitutes Australia territorial limits. Most importantly, the problem could also be attributed to the need to interpret the Seas and Submerged Lands Act of 1973 in the context of Section 51 (xxix) of the Australian Constitution. The ambiguity in the language of the constitution also served as impetus to the exercise of state powers over fisheries within the three mile territorial waters of Australia, which the Australian states regarded as their pre-colonial boundaries. As a result, Australia adopted judicial and executive or practical approaches in resolving the dispute.

2 Judicial approaches to the problems

The States challenged the constitutional validity of the Seas and Submerged Lands Act, in the case of *State of New South Wales and 5 others vs. The Commonwealth of Australia*.³⁶ The six states jointly sought declarations that the Act was wholly or partly invalid and whether section 51(xxix) of the constitution, which empowers the Parliament to legislate on external affairs could be used as the basis for the enactment of the law. The states based their claims on the following reasons:

³⁶ (1976) 50, A.L.J.R. p. 218

- (a) The states believed that they had prior to federation, and continued to have after federation, sovereignty and legislative powers over the TS adjacent to their coasts up to three-mile limit, and over the sea-bed, subsoil and the superjacent airspace of the TS as well as over the CS.
- (b) They also contended that the vesting of sovereignty in the Crown in right of the Commonwealth as seen in Sections 6, 10 and 11 of the Seas and Submerged Lands Act, amount to the creation in the Crown of a power which could not be constitutionally vested.
- (c) It was also contended that the Act was not a valid exercise by the Parliament of the external affairs power conferred by Section 51 (xxix), or of the power as to territories under Section 122 of the Constitution.

The court however held the above sections of the constitution and the Seas and Submerged Lands Act to be a valid exercise by the Commonwealth legislature and that the validity could also be argued to be derived pursuant to the provisions of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and also on the Continental Shelf Convention of 1958, which grants sovereignty over the TS and sovereign right over the CS to the coastal States. On this basis, the Parliament was right to enact domestic legislation to claim the rights. The court held further, that:

both prior to and after Federation, the plaintiff states, whether originally as colonies or later as states, did not in their own right have sovereignty and legislative power over the territorial sea up to three-mile limit, or over the sea-bed and subsoil and superjacent air space of the territorial sea up to this limit.³⁷

The decisions thus consolidate the Commonwealth's title over the adjacent maritime territory.

2.1 Analysis of the judgment

As seen above, the Commonwealth did not contest the fact that the TS formed part

³⁷ Ibid at p.219

of the territories of the states as alleged prior to federation but instead, it maintained that, “if prior to the enactment of the Commonwealth Constitution, the states had such sovereignty and legislative power, this passed to the Commonwealth upon the commencement of federation, or at the latest on Australia becoming a fully independent State.”³⁸ This statement to all intents and purposes could be regarded as an affirmation by the Commonwealth that the plaintiff states indeed exercised prior to Federation and independence of Australia sovereignty and legislative powers over the TS. This corresponds with our earlier views in chapter two that prior to colonialism, the FCU indeed held sovereignty and legislative powers over the three-mile TS, but that the same could pass and had indeed passed as a matter of state succession in international law to the Federal Government at independence, which is the sole authority that could rightfully succeed to such authority.

Furthermore, the decision may be supported to the extent that it affirms the power of the Commonwealth – a sovereign nation as part of its external affairs power to enact the Seas and Submerged Lands Act (as amended by the Maritime Legislation Amendment Act 1994) and the exclusive right of the Commonwealth over the CS. The sovereignty and sovereign rights mentioned in the Geneva Conventions and now UNCLOS can only be exercised by sovereign independent States and only they could enact domestic legislation to claim the rights. While O’Connell agrees, I disagree with the conclusion that low-water-mark marks the limit of the colonies and hence that the states either prior to or after Federation did not in their own right have sovereignty and legislative power over the littoral sea up to three-mile limit. There are four reasons. Firstly, the views are contrary to those expressed by Murphy J. in the same case, in which he acknowledges that the “states might as colonies prior to Federation have exercised some jurisdiction over the TS and its sea-bed and subsoil...” Secondly, the views as expressed by the high court were based essentially on the authority of *R vs. Keyn*, which has been earlier argued not to represent the correct position of Britain regarding the TS. Thirdly, the decision of

³⁸ Ibid at p. 219

the court contradicts its own earlier decision in *Bonser vs. La Macchia*,³⁹ where the ‘territorial limit’ referred to by section 51(x) of the constitution, was held to refer to the TS. The decision equally affirms that the fisheries power of the Commonwealth extends from beyond the ‘territorial limit’.

The confusion that the *R vs. Keyn* generated emanated, from the lack of perception on the part of the judges about the true distinction and meanings of the word ‘territory,’ ‘ownership’ and “control.” Clearly, the issues are distinguishable one from the other and were clearly identified by Stephen J in the Australian case of *State of New South Wales and Others vs. the Commonwealth of Australia*,⁴⁰ a case that was heavily relied upon by the Supreme Court of Nigeria. Stephen J in that case, tried hard to explain the meaning of the words. According to him, territory may mean “realm” and the body of any county, these been the geographical limits of the jurisdiction of the common law courts; or it may refer to territory in the sense of Crown ownership. He argued that, the word “territory” was used in the first sense only (that is realm and the body of a county) in *R vs. Keyn* to demarcate the limits of curial jurisdiction; *R vs. Keyn* did not decide that the territory of England, in the second sense (ownership), ended at low- water mark. He argued further that the later case of *Harris vs. Owners of Franconia*,⁴¹ which has been regarded as accepting *R vs. Keyn* as an authority for the proposition that the territory of England ended at low- water mark, has been misunderstood, that each member of the court in Harris’ case spoke of territory in a jurisdictional sense, thereby equating “territory” with “realm” and the body of any county. This is why the Territorial Waters Act of 1878 was specifically enacted to address the issue of jurisdiction raised in that case and not any other issue, since that is the issue the case decided and not the limits of the English territory in the sense of Crown ownership, which was never in contest in that case.

After he concluded that the British Crown exercised the power of dominion and

³⁹ (1969) 122 CLR., 177

⁴⁰ *Supra.*, n. 37

⁴¹ (1877) 2 C.P.D. 173: 46 L.J.C.P. 363

imperium over the TS surrounding England and Australia, despite the constructions, which have been placed on *R vs. Keyn*, Stephen J then turned his attention to the effect of the grants of responsible government to the colonies on this position. According to him, with the grant to the colonies of legislative authority over Crown lands went also executive control (citing O'Connor J. in *South Australia vs. Victoria*⁴²), and with executive control came the Crown prerogatives in the nature of proprietary rights, over the land mass and over the TS: "sovereignty over the colonial land mass carried with it ownership of and dominion over its league (territorial) seas..."

Peter Goldsworthy submitted that had this important distinction been fully accepted and faithfully followed by the court in the *New South Wales* case, some of the arguments both for and against state ownership of the TS would have fallen. He tried to draw out the distinction between imperium and dominium by reference to the comments of Professor O'Connell that "on this topic there would seem to be a fundamental cleavage between common law systems and civil law systems."⁴³ He went further by stating: "Sovereignty and property are indistinguishable conceptions to the common lawyers, but that the civil lawyers have emancipated the concept of sovereignty from the notion of property."⁴⁴ It is hard to fathom how a realization of the distinction between imperium and dominium would have made the arguments canvassed by Stephen J. to crumble if both terms were indistinguishable to common law countries, which Britain and its colonies indeed represent. It is the view of O'Connell that because marginal waters were regarded as property and were not distinguished from bays and harbors, the many cases then decided by English courts naturally proceeded on the basis of the Crown's ownership of the sea and seabed. The state exercises a plenary power called imperium (political sovereignty) without necessarily enjoying dominium (title, ownership) over the territorial sea. "So some continental courts have held that the

⁴² (1911) 12 C.L.R. 667 at 710

⁴³ O'Connell, D.P., *International Law*, vol. 1 (2nd ed.) Stevenson and Sons, London (1970), at p. 403

⁴⁴ Ibid. at p. 475; Peter G., "Ownership of the Territorial Sea and Continental Shelf of Australia: An Analysis of the Sea and Submerged Lands Act Case (State of New South Wales and Others vs. the Commonwealth of Australia)," vol. 50, (1976), *the Australian Law Journal*, p. 175 at 180 – 181.

territorial sea while subject to sovereignty is not within the national domain.”⁴⁵ Stephen J argued that the failure to recognize the distinction led later authority to misinterpret *R. vs. Keyn*.

If the Australian High Court had accepted the distinction highlighted above between imperium and dominium the views of the majority of the judges that the discharge of international responsibilities in respect of the TS and function of protecting the nation required that Commonwealth title (dominium) in the TS be recognized, would have lost much of their force. Recognition of Commonwealth imperium would have been sufficient to secure those functions. Had they understood this distinction, they could have granted the power of imperium to the Federal Government while the federating units along the coast retain dominium over the TS. This is so because, according to Gibbs J in the instant case and Frankfurter J. in *United States vs. California*, the correctness of the argument is not self-evident because ownership is one thing and control and power is another: ownership of the TS in a state would not hinder the control of that area by the Federal authority. While it may not be so much controverted that control of TS be vested in the Federal Government and the states the ownership thereof, it will however be contrary to the common law practice that dominium and imperium be kept separate.

3 The practical approach to resolution of the problems

3.1 The 1967 Agreement

Australia like the United States adopted certain practical measures, which in what may be termed accurate forecast by Prof. Warbrick, “the first step may be the last, for it has been the avowed purpose of the representatives of the several authorities to achieve an accommodation between them that would make constitutional litigation unnecessary”.⁴⁶ This determination in the first place has led to genuine dialogue and negotiation by the several authorities in Australia to achieve accommodation where necessary which in the final analysis led to the conclusion of

⁴⁵ Ibid., at p.475

⁴⁶ Warbrick, C., “Shorter Articles, Comments and Notes: Off-shore Petroleum Exploitation in Federal Systems: Canadian and Australian Action,” vol. 17, (1968), *I.C.L.Q.* p. 501.

the agreement relating to the Exploration for, and Exploitation of, the Petroleum Resources, and certain other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of certain other Submerged Land of 16th October, 1967.⁴⁷ A clause in that agreement reads:

“And whereas the Governments of the Commonwealth and of the States have decided, in the national interest, that, without raising questions concerning, and without derogating from, their respective constitutional powers, they should co-operate for the purpose of ensuring the legal effectiveness of authorities to explore for or exploit the petroleum resources of those submerged lands.”⁴⁸

In line with the preamble therefore, the Commonwealth, the states and the Territory agreed to establish a Common Mining Code to operate in the adjacent areas” of the Australian off-shore, with no distinction between territorial seabed and CS. Each State is to administer the Code in that portion of the adjacent area allocated to it under the Agreement.⁴⁹ The Agreement reserves for the Commonwealth all its constitutional rights with regards to:

- (a) trade and commerce with other countries among the States, including navigation and shipping;
- (b) External affairs;
- (c) Taxation, including taxes in the nature of duties of customs and excise;
- (d) Defence;
- (e) Lighthouses, lightships, beacons and buoys;
- (f) Fisheries in Australian waters beyond territorial limits; and
- (g) Postal, telegraphic, telephonic and other like services.

Under section 12 of the Agreement, the states undertake to take “all reasonable steps” to secure compliance with the obligations of Australia under the Continental shelf Convention of 1958. The percentage of sharing of the royalty was fixed at 10 percent of the value of petroleum produced at well-head, which monies are to be

⁴⁷ Lumb R.D., “the Off-Shore Petroleum Agreement and Legislation” vol. 41, (1968) *Australian Law Journal* 453

⁴⁸ Ibid.

⁴⁹ Ibid at p. 509

divided in the ratio of 40:60 between the Commonwealth and the states (section 19). Further to this, all license fees and override royalties go to the states (section 22). The importance of the above arrangement in line with Professor Warbrick's observation is that it has made recourse to constitutional litigation to resolve the dispute unnecessary and thus may be said to have resolved it in a way, however the arrangements have potential implications for international law and may lead to some difficulties. Since both parties have decided that they would not raise issues concerning their individual constitutional rights, a difficult question of rights was thus left unanswered and as will be seen below, such a failure contributed to the replacement of the Agreement by a subsequent Australian administration. Implementation of the Agreement was not without its own difficulties. It was capable of creating conflict between the interests of the Federal Government and the interests of the states and the interests of Australia as a State and the interests of other States, which no doubt could involve Australia in unnecessary international responsibility.

3.2 Legislative approach

3.2.1 Enactment of the Petroleum (Submerged Lands) Act 1967 (Cth)

As a further step at resolving the title problems over Australia offshore areas, the provisions of the 1967 Agreement were incorporated as an Act of the Australian Parliament.⁵⁰ The new arrangement under this Act operates in two divisions. First, in the offshore areas beyond three nautical miles from the TS baseline, petroleum operations are subject to the above mentioned legislation. Within this limit and within the coastal waters, complementary State and Territory legislation applies, also known as the Petroleum (Submerged Lands) Act. The Commonwealth Petroleum (Submerged Lands) Act 1967 established Joint Authorities for the offshore area adjacent to each state and the Northern Territory.⁵¹ Each Joint Authority consists of the Australian Government Minister for Resources and the relevant state Minister for Mines (later known as the Designated Authority). This is

⁵⁰ Petroleum (Submerged Lands), Act (Cth), No. 118 of 1967.

⁵¹ Ibid, section 8 A (1), (2) & (3), (part 1 A).

made clear by a paragraph in the preamble to the Act, which states; “And whereas it has been agreed between the Commonwealth, the states and the Northern Territory that, in place of the scheme provided for by an agreement between the Commonwealth and the states dated 16 October 1967 –

- (a) legislation of the Parliament of the Commonwealth in respect of the exploration for and the exploitation of the petroleum resources of submerged lands should be limited to the resources of lands beneath waters that are beyond the outer limits of the territorial sea adjacent to the states and the Northern Territory (being outer limits based, unless and until otherwise agreed, on the breadth of that sea being 3 nm), and that the States and the Northern Territory should share the administration of that legislation; and
- (b) Legislation of the Parliament of each state should apply in respect of the exploration for and the exploitation of the petroleum resources of such part of the submerged lands in area adjacent to the state as is on the landward side of the waters referred to in paragraph (a); and
- (c) Legislation of the Legislative Assembly of the Northern Territory should apply in respect of the exploration for and exploitation of the petroleum resources of such part of the submerged lands in an area adjacent to the Northern Territory as is on the landward side of the waters referred to in paragraph (a)⁵²

Essentially, the provisions grant the Commonwealth legislative powers over petroleum resources of the CS, while the states are to participate in the administration thereof. The legislation of the states and the Northern Territory are to apply exclusively within the three-mile TS and in the internal waters. Thus this Act like the Agreement preceding it established Joint Authorities for the offshore areas adjacent to each state and the Northern Territory seaward from the limit of three miles. Each Joint Authority consists of the Australian Government Minister for Resources and the relevant state Minister for Mines (later known as the Designated Authority), whose functions are provided for under section 8 c of the above

⁵² Ibid.

mentioned Act.

3.2.2 Enactment of the Seas and Submerged Lands Act of 1973 (Cth)

The agreement and later the Act that was enacted consequent upon it suffered a temporary setback in 1972 as a result of the changes which occurred in the political terrain of the country. The changes ushered in a new leadership who did not agree with the existing arrangement mentioned above. The new leadership was therefore determined to implement a stronger commonwealth initiative which would ensure the Commonwealth's unfettered sovereignty over the entire internal waters and the TS thereof and sovereign rights over the CS. This, he achieved through initiation of a law - the Seas and Submerged Lands Act of 1973 (Cth), which as noted earlier proclaims the Commonwealth's sovereignty over both the internal waters and the TS and sovereign right over the CS. This arrangement and the court action that followed thereafter created some difficulties but this did not last long.

3.2.3 The Offshore Constitutional Settlement of 1979

In order to cushion the effect and the acrimony which the Submerged Lands Act generated, the Liberal government which came to power in 1975 took a dramatic step in initiating another procedure which would accommodate the interests of the states and the Northern Territory by sharing both the resources of the offshore and the responsibility of administering them between the tiers of Australian government. This in effect led to the adoption of the 'Offshore Constitutional Settlement' of 1979. The federating units, being anxious to avoid a repetition of the experience of earlier agreement, individually passed a law through their parliament requesting the Commonwealth to incorporate the terms of the settlement in an Act of Australian Parliament.⁵³ Thus, the Commonwealth Legislature responded by enacting 14 pieces of legislation to accommodate the interests of the states and the Territory in the submerged land areas. Relevant to our discussion here is the Coastal Waters (State Powers) Act of 1980. Section 5 of that Act provides as follows: The

⁵³ New South Wales enacted Constitutional Powers (Coastal Waters) Act 1967 with corresponding legislation by South Australia, Tasmania, Western Australia. The States of Victoria and Queensland enacted theirs in 1980

legislative powers exercisable from time to time under the constitution of each state extend to the making of –

- (a) all such laws of the state as could be made by virtue of those powers if the coastal waters of the state, as extending from time to time, were within the limits of the state, including laws applying in or in relation to the sea-bed and subsoil beneath, and airspace the above, the coastal waters of the State;
- (b) laws of the state having effect in or in relation to waters within the adjacent area in respect of the state but beyond the outer limits of the coastal waters of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the first mentioned waters, being laws with respect to -
 - (i) subterranean mining from land within the limits of the state; or
 - (ii) ports, harbour and other shipping facilities, including installations, and dredging and other works, relating thereto, and other coastal works; and
- (c) laws of the State with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the state, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the states are parties, to be managed in accordance with the laws of the state.

The provisions above are important in that they confirm in unambiguous terms the authority of a state to legislate first in matters within coastal waters, which according to section 4 (2) could be said to be within three mile TS adjacent to a state. This same section stipulates that if in future the breadth of the TS is determined or declared to be greater than 3nm references in this Act would continue to remain the three nautical miles and not including any new TS dimension beyond three miles. The importance of this provision could be better appreciated, having regard to Article 3 of UNCLOS, which declares the breadth of TS at 12 nautical miles. Without the provision above, Australia would have probably engaged in other rounds of dispute with the states when on the 13 November 1990, it

announced an intention to extend its TS from three to 12 nautical miles.⁵⁴

Furthermore, the Act is important in that it extends the legislative powers of the states to the maritime territories beyond the coastal waters (referred to in the Act as the 'adjacent area') to include activities such as fisheries, shipping facilities, installations, works and subterranean mining commenced within the limits of a state. The 'adjacent area' being referred to is defined by reference to series of geographical coordinates under Schedule 2 of the Petroleum (Submerged Lands) Act 1967.

Another Act relevant to the Offshore Constitutional Settlement is the Coastal Waters (State Title) Act 1980 (Cth). Section 4 (1) thereof vests in each state exactly the same title granted by a similar Act to its adjacent coastal waters and subjacent seabed as if those areas formed part of the territory of the state. It should be noted that even though this Act and its counterpart both confer legislative powers on the states, they are equally instructive in the matter of resources management. Pursuant to this Act the states rather than the Commonwealth have consistently managed the TS. The two Acts equally confer administrative responsibilities on the relevant federating units and like the previous arrangements, the units under Offshore Constitutional Settlement and subject to an arrangement between them and the Commonwealth exercise legislative powers beyond the three-mile TS adjacent to each of them.

The validity of the Offshore Constitutional Settlement, especially as it affects rock lobster fishery, has been challenged in the High Court in the case of *Port MacDonnell Professional Fishermen's Association vs. South Australia*.⁵⁵ In that case, the plaintiffs sought a declaration *inter alia*; (a) that an arrangement between the defendants in term of an instrument appearing in the Commonwealth of Australia Gazette No. 5104 of 1st June, 1987 and entitled "Arrangement in relation

⁵⁴ Evans G. and Duffy, M., "Australia Extends Territorial Sea" vol. 61, (1990) *Australian Foreign Affairs and Trade* p. 816

⁵⁵ (1989) 168 C.L.R 340

to Rock Lobster Fishery between the Commonwealth of Australia and South Australia” and a similar one in another Gazette, No. 5406 of 21 December 1988, which were expressed to have been made pursuant to the provisions of the Fisheries Act 1952 (Cth.) and the Fisheries Act 1982 (South Australia), were beyond the power of the state of South Australia and of the Commonwealth; (b) that section 14 of the Fisheries Act (South Australia) was beyond power and (c) in the alternative, that section 14 of the Fisheries Act (South Australia) and the Regulations made thereunder in so far as they applied to the Outside Fishery and the Outside Defined Fishery (as described in paragraph 4 A and 11 of the amended statement of claim) were in-consistent with section 5 A, 8 and 9 of the Fisheries Act (Cth.) and the Regulations made thereunder. The court upheld the validity of the joint agreement and in doing so also endorsed the relevant portion of the Settlement. The success of the above arrangement does not depend entirely, according to Rothwell and Kaye, on whether Australia’s offshore constitutional legal frame work is founded in the ‘Commonwealth Constitution’, nor does it depend totally on the ‘role of the high court in providing a degree of legal certainty to the position of the Commonwealth’ but that the success of the arrangement could also be attributed substantially to the ‘political compromises found in Offshore Constitutional Settlement which have had contemporary impact.’⁵⁶ The result of all the above according to Rothwell and Kaye is that “the management of Australia’s offshore areas is a complex web of Commonwealth, State and Territorial control, ownership and title.”⁵⁷

The entire Commonwealth, State and Territory arrangements alluded to are without prejudice to the Australia’s responsibility under international law.⁵⁸ Such as its responsibilities with regards to the defence of Australia, formulation of marine policy on navigation and shipping, external affairs, postal, telegraphic and telephonic. Rothwell and Kaye have identified other areas where the Commonwealth may be argued to have priority and or influence over the states. The

⁵⁶ Rothwell D.R., and Kaye, S.B., “Australia’s Legal Framework for Integrated Oceans and Coastal Management”, Cooperative Research Centre for Antarctica and the Southern Ocean, *Research Report*, Hobart, Australia, 26 May, 2001, p.15.

⁵⁷ Ibid.

⁵⁸ Section 6, Coastal Waters (State Powers) Act, No. 75 of 1980

government of Australia despite the arrangements referred to above still has primary responsibility to represent Australia at international forum convened to consider the adoption of international environmental and marine instruments. It is also the Commonwealth government that has responsibility of either accepting or rejecting these international initiatives, and primary responsibility for ensuring that the terms of the treaty are fulfilled.

Under the provisions of the 1992 Intergovernmental Agreement on the Environment (IGAE), Rothwell and Kaye observed that, the Commonwealth has agreed to consult with the states prior to ratifying, acceding, approving, or accepting any international agreement with environmental significance. They further observed that, in addition to the above, the Commonwealth government occasionally includes a representative of one of the Australian states as a member of a delegation negotiating international environmental conventions.⁵⁹ The whole arrangements are also without prejudice to the Commonwealth's declared sovereignty over the territorial sea and sovereign right over both the EEZ and the Continental Shelf. Thus the Australian approach to the settlement of its dispute with its component units represents another unique approach at settlement of problems of title to maritime territory in federal States.

In contrast, the Australian approach described above, though it is unique and may be suitable for the Australian society, a similar approach would be difficult to negotiate and implement in Nigeria for a number of reasons. Firstly, the approach if adopted in Nigeria would not satisfy the resources control yearning of the Niger Delta members of the FCU and as such it would not abate the current agitation for resources control. Secondly, the multiethnic nature and other diversities of the Nigerian society and the multiplicity of interests it has generated (particularly in the Niger Delta areas of Nigeria where there are about 40 different ethnic nationalities who speak about 250 different dialects) over the ownership of the sea and its resources would make it very difficult to negotiate and adopt similar approach as

⁵⁹ Ibid.

Australia. Thirdly, since oil and gas revenue represents the largest sources of revenue for Nigeria, the Federal Government, which represents the generality of Nigerians, may not be willing to adopt the Australian approach to the resolution of its maritime title dispute. This is because of the adverse effects and the in-equity that the approach is capable to cause other non coastal and non oil and gas producing federating units. For the above reasons therefore, the Australian approach may not be suitable for the resolution of the maritime title dispute in Nigeria.

IV The practice of Canada

Canada like the two States mentioned above is a Federal coastal State. It is a former colony of Britain, thus it shares similar experiences with them of Federal versus Provincial dispute over the ownership of its maritime territory. Canada's approach to the resolution of the dispute is akin to that adopted by the United States in one significant respect. Instead of the Federal Government negotiating with the Provinces as Australia did, it preferred like the United States to first refer the matter for adjudication by the Court. Like the United States also, the Canadian Supreme Court resolved all questions relating to ownership of both the TS and the CS referred to it in favour of the Federal Government of Canada.

1. Judicial approach to the resolution of the problems

As in the case of United States, Canada brought an action in the Supreme Court in *Reference Re Ownership of Off-shore Mineral Right* to resolve its offshore title problems. The case concerns a request for declaration of the question of ownership and jurisdiction over off-shore mineral rights, between Canada and British Columbia. That is which between Canada and British Columbia owns or should own lands, including the mineral and other natural resources, of the sea-bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, 1964 (Canada) C22. Similar question was also formulated with respect to the CS. The Canadian Supreme Court like its

United States counterpart awarded ownership and legislative jurisdiction over the TS and sovereign right over the CS to Canada. With regards to the CS, the court is of the view that two reasons account for British Columbia lacking the right to explore and exploit or legislate over the CS. According to the court;

- (i) the continental shelf is outside the boundaries of British Columbia, and
- (ii) Canada is the Sovereign State which will be recognized by international law as having the rights stated in the 1958 Geneva Convention, and it is Canada that will have to answer the claims of other members of international community for breach of the obligations and responsibilities imposed by that convention.⁶⁰

Thus, like the United States and Australia, the Canadian Supreme Court again affirmed the Federal Government's title over the off-shore areas. The decision no doubt is consistent with international law.

2. Practical approach taken to resolve the problems

Following the decision of the Supreme Court, Canadian Provinces were left with no other option than to enter into dialogue with the Federal Government with a view to seeking a cooperative scheme for the management of the offshore areas. In doing this the five Atlantic Provinces decided to adopt a common approach and on July 16, 1968 they established a Joint Mineral Resources Committee (JMRC) to act on their behalf in negotiating with the Federal Government a common and acceptable scheme that would ensure their interests and participation in the administration of the resources of the maritime territory adjacent to their coasts. It was the Federal Government that made the initial move by proposing a scheme which allows it to take control of administration of most of the offshore with provincial revenue sharing, as well as provincial administration within "mineral resources administration lines" close to the provincial coasts. However, this proposal and the one that followed thereafter, which proposed a pooling of offshore revenues, were unacceptable to the east coast provinces.

⁶⁰ (1968) 65, D.L.R. (2nd), pp. 345-346.

Following the failure to reach agreement on the initial negotiation, a series of other agreements were concluded by the individual province with the Federal Government. The refusal of the Federal Government to heed the request by some of them to give effect to the boundary agreement reached eventually led to the institution of the *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*,⁶¹ case. The case was instituted to determine whether the dominion of Canada or that of the Province of Newfoundland had the right to explore and exploit, and to legislate in relation to exploration and exploitation of the mineral and other natural resources of the area of the CS known as the Hibernia field, which was adjacent to the coast of Newfoundland and which is located approximately 320 Kilometers from Newfoundland coast. The location of the field ruled out a determination on TS. The Supreme Court as it did in the 1967 Offshore Reference held *inter alia* that the right to explore and exploit the resources of the subsoil of the CS of Newfoundland belonged to the Canadian Federal Government and that the Federal Government alone had legislative jurisdiction to make laws in relation to hydrocarbon exploration and development. Furthermore, it held that any rights which Newfoundland held at the time of confederation would have been automatically transferred to Canada when Newfoundland relinquished its sovereignty and became a province of Canada.⁶² Thus the case provided more legal support to the authority of the Federal Government of Canada over the entire submerged land areas adjacent to Canada.

2.1 The 1985 and 1986 Agreements

After the above case, several other accords were agreed between the Federal Government and the provinces on a scheme for joint management and utilization of submerged land resources. Notable among the accords are, the Canada – Newfoundland – Labrador agreement of 1985, which led to a joint legislative action that produced the Atlantic Accord Implementation Act of February 11, 1985, C. 26; the 1986 Canada – Nova Scotia accord, which equally led to the enactment of a

⁶¹ I.L.R., vol. 86, 595 at 625; (1984) 1 S.C.R. 86

⁶² Ibid.

joint implementation Act.⁶³ Thus in 1996, the Federal Government in order to harmonise the various agreements reached with the provinces enacted the Oceans Act with provisions, spelling out in a broad, clear and unambiguous terms the rights of both the Federal and the provincial Governments over the maritime territory of Canada,⁶⁴ details of which are discussed in paragraph 3 below.

2.2 Adoption of a collaborative approach

The above notwithstanding, the Federal Government was well aware that the maritime territory with its resources cannot be meaningfully understood, realistically and harmoniously managed in a way that would sustain them both for the present and also for the future generations without the participation and involvement of the major stake holders. The government therefore made it a matter of deliberate policy to adopt a collaborative approach toward effective and harmonious management of the resources of the maritime territory. Thus most of Canada's marine activities were fashioned in a way that ensures collaboration and participation of the Aboriginal people, the local communities along the coast, the provinces and territories and even governmental and non-governmental agencies. This was achieved first and foremost by the formulation of the various accords with the provinces and later through the enactment of an Act of Parliament in a way that ensures the application of provincial laws, which in most cases apply with equanimity with the federal laws in all the zones of the Canadian oceans.

3. Legislative approach at resolving the problems

In order to legalise the practical and collaborative approaches, the Canadian Parliament enacted the Oceans Act of 1996. This Act ensures that as soon as the Federal interests are declared by the Act over a particular maritime zone it is always and simultaneously followed by the declaration of the provincial interests. This can be seen in the first place by the provisions of section 7 of Ocean Act mentioned above, which immediately after declaring that the internal waters and the territorial

⁶³ See the Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, C. 28

⁶⁴ S.C. 1996, C. 31

sea form part of Canada and by section 8 (1), which affirms the Federal Government's title over the internal waters of Canada it was immediately followed by the provisions of Section 9 (1). This section grants legislative rights over internal waters, the waters not within the provinces and the waters prescribed by regulation to the provinces. Subsection (3) thereof stated that the laws of the provinces apply in these areas as if the same were within the territory of the provinces.

Furthermore, section 13 after declaring the EEZ of Canada, section 14 thereof went ahead to affirm the sovereign rights and jurisdiction of Canada as a federation to the exploration and exploitation, conservation and management of the natural resources whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. This power covers establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment. The same rights and powers as above are equally conferred by section 16, 17 and 18 of the Act on Canada with regards to the EEZ and the CS respectively. By section 20 therefore, federal laws apply to all installations or structures and artificial islands and the safety zones around any installation within the CS.

Section 21 (1) of the Act, enables the laws of the provinces to be applicable in the same extent as federal laws apply both with respect to the EEZ and also to the CS. By virtue of subsection (4) thereof any sum due under the laws of the province with regards to the areas mentioned belongs to Her Majesty in right of the province. Similarly and by virtue of Section 22 (1), a court that would have jurisdiction in respect of any matter had it arisen in a province is given jurisdiction to try offences involving federal law that applies pursuant to this Act to the extent that the matter arises in whole or in part in any area of the sea that is not within any province and that area of the sea is nearer to the coast of that province than to the coast of any other province or that is prescribed by a regulation. By this Act therefore, the foundation is laid for the application of both the Provincial and Federal Government laws in virtually all maritime zones falling within the national jurisdiction of

Canada.

3.1 The Canada-Newfoundland Atlantic Accord Implementation Act of 1987

The integrated oceanic management is applicable to virtually all areas of Canadian oceanic sectors and activities ranging from conservation and management of the marine environment, fishing, exploration and exploitation of oil, gas and other mineral resources of the ocean. With respect to the petroleum sector for example, the collaborative approach is reflected by Canada and Newfoundland jointly adopting oil and gas exploration and exploitation strategy through the enactment of an Act of Parliament.⁶⁵ Section 9 (1) of this Act establishes a board known as the Canada – Newfoundland Offshore Petroleum Board comprising seven members, three of whom are to be appointed by the Federal Government, three by the Provincial Government and the Chairman of the Board is to be appointed by both the Federal Government and the Provincial Government.⁶⁶ The Board has the authority and responsibility *inter alia* to make all necessary decisions to permit the exploration for, and the development and production of, offshore oil and gas. Other Boards have equally been established in other coastal Provinces to carry out similar functions as in the Canada – Newfoundland noted above.⁶⁷ Revenue accruing from offshore petroleum activities was initially shared between the Federal Government and the Provinces of Newfoundland and Labrador and Nova Scotia with each Province receiving 20 cents of every offshore revenue dollar and while the Government of Canada received 80 cents, including federal corporate income taxes.

However with the signing of the Atlantic accord with Newfoundland and Labrador in 1985 and a similar accord with Nova Scotia on March 2 1982, both provinces are to receive the entire revenues from their respective offshore resources until their

⁶⁵ Canada – Newfoundland Atlantic Accord Implementation Act, S.C. 1987, C.3

⁶⁶ Ibid, section 10 (1) and (2)

⁶⁷ In Nova Scotia, the board is known as Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act passed in 1998, which implemented the Canada – Nova Scotia Offshore Petroleum Resources Accord of 1986.;
http://www.cnsopb.ns.ca/archives/summary04_print.html.

economies grew to the national average level.⁶⁸ A wider sharing of offshore revenue with all Canadians would take place only and until for example, Newfoundland and Labrador have benefited substantially from oil and gas production revenue and have reached the proposed “trigger” stage. Going by the provisions of section 3 (1) of Offshore Petroleum Royalty Act (Canada) (S.N.S 1987, C. 9), the royalties received from the offshore petroleum and gas activities are reserved to Her Majesty in right of the affected provinces and each holder of a share in production license. This arrangement covers the entire offshore areas defined as the submarine areas lying seaward of the low-water mark of the Province and extending, at any location, as far as

- (a) any prescribed line, or
- (a) where no line is prescribed at that location, the outer edge of the continental margin or a distance of two hundred nautical miles from the baselines from which the territorial sea of Canada is measured, whichever is greater.

In the sector of conservation and management of marine environment, the collaborative approach is reflected through the enactment of Canada National Marine Conservation Areas Act, S.C. 2002 (C. 18). Thus the last paragraph of the preamble to this Act coupled with the provisions of Section 8(4), 10 (1) and 11 (3) all envisage involvement of federal and provincial ministers and agencies, affected coastal communities, aboriginal organizations, aboriginal governments and bodies established under land claims agreements and other persons and organizations in the conservation of the marine environment.

In the fisheries sector the collaborative and integrated approach to oceanic resource management is reflected by the refusal of the Canadian courts to grant claims to exclusive fisheries made to them by the Native Americans. The rights where considered at all, have been restricted in most cases to non-navigable rivers and lakes rather than in the sea. Thus in the sea and navigable rivers, the court in *R vs.*

⁶⁸ Clause (d) of Canada – Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing, March 2, 1982; see also a similar proposal made by the government of Canada to the government of Newfoundland of September 2 1982.

*Sparrow*⁶⁹, *NTC Smokehouse Ltd vs. R*⁷⁰ *Adams vs. R*⁷¹ have refused to accept exclusive fishery rights in any native but instead, held that the public rights to fish and navigate hold sway in such waters.⁷² It can therefore be rightly argued that in the Oceans of Canada, the fishery rights of all Canadians whether they are indigenous or not are protected and guaranteed.

The Canadian approach has only temporarily but not conclusively resolves the dispute between the Federal Government and the Coastal Provinces over the ownership of the maritime territory. This argument is reinforced by the rather ambiguous methods proposed for the determination of when Newfoundland and Labrador and Nova Scotia and other coastal provinces with similar agreements have substantially benefited and when all of them have reached a “trigger” or their economies growing to national average level. Even when the trigger stage is eventually determined, another round of negotiations, which in most cases may be cumbersome, has to ensue in order to agree on a percentage of sharing. From the foregoing, the collaborative and integrated approach to oceanic resources management reflects the method by which Canada has successfully resolved or at least abated the title problems over its maritime territory and resources.

Giving the difficulty involved in negotiating acceptable revenue sharing formula in Nigeria, this type of Canadian approach to the problem would be difficult to implement. This is because, in Nigeria there are varying interests and tribal sentiments and demands that need to be involved and satisfied in the process. In addition the Canadian approach does not make a clear cut distinction between the Federal Government’s interests over the various maritime zones and resources adjacent to Canada and the interests of the federating units over the same zones; the approach will create serious conflict of interests between the Federal Government and the FCU if it is introduced to Nigeria.

⁶⁹ (1990) 1 SCR 1075

⁷⁰ (1996) 137 DLR (4th) 528

⁷¹ (1996) 138 DLR (4th) 657

⁷² See *R. vs. Lewis* (1996) 1 SCR 921.

V Conclusions

In conclusion, the United States after the initial court cases adopted a quitclaiming approach to resolve the title problems over its maritime territory. This approach represents a more pragmatic and realistic approach that has substantially put to rest the title problems over the maritime territory of the United States. This approach would be best to resolve similar title problems in Nigeria if the constitution could be amended to give the National Assembly the power to make similar quitclaiming to the FCU.

In the case of Australia, several approaches were initially adopted until the latest, which is known as the Off-shore Constitutional Settlement of 1979. This approach ensures the accommodation of the interests of the states and the northern territory by the sharing of off-shore resources and the responsibility of administering them between the Commonwealth and the states and northern territory. The terms of the Constitutional Settlement were incorporated in an Act of Parliament. By the several Acts, the Australian states and territory now possess legislative powers over the sea areas, including the seabed, subsoil and airspace above the coastal waters adjacent to each state. They also possess the same powers over mining, ports, harbours and other shipping facilities within the limits. The limit being referred to according to section 4 (2) of Coastal Waters (States Powers) Act is the three mile TS. The Act also extends the legislative powers of the states over fisheries to submerged land areas beyond the coastal waters.

Canada's approach to resolution of its title problems is similar in nature to that adopted by Australia. After the initial court cases and the various Accords, Canada adopted a collaborative and integrative approach toward effective and harmonious management of the resources of the maritime territory between the Federal Government and the Provinces. By this method, both the Federal Government and the Provinces now possess the same or similar rights and powers over the various maritime zones adjacent to Canada. The Canadian approaches could also be

relevant in resolving similar title problems in Nigeria if proper constitutional foundation could be laid for its adoption.

Chapter Seven

Conclusions and Recommendations

In this thesis different legal issues and problems have been raised and examined; it is therefore not intended to review them for summarization issue by issue. Instead, the focus will be to explore the salient themes of significance to international law. It is useful to begin by re-evaluating the following themes:

- (a) Problems based in Nigeria's federal structure
- (b) The relation of National and International law
- (c) Colonialism and Self Determination

(A) Problems based in Nigeria's federal structure

States in general have problems of international law in one form or another, but the problems of international law in federal States are peculiar because there is more than one centre of power. The federal structure reflects the international features of politico-legal life. It exists at every level, local, regional, national and international. The nomenclature may differ from one federal State to another but most federal States are composed of local governments, states or provincial governments and the Federal Government. This is exactly the case in Nigeria, with local governments at the lowest level of the hierarchy, followed by states and the Federal Government. The Federal Government in Nigeria controls virtually all spheres of Nigeria's national life, including the economy, resources on land and maritime territories, the army and the police. This creates problems for international law, because there is competition for supremacy, sovereignty, control of natural resources, international legal personality and even sovereign immunity between the federation and its units.

Nigeria is not an exception in the creation of these international law problems, the degree or intensity may vary but the problems are prevalent in most federal States. The problems as far as Nigeria is concerned are mostly perceived while some others are real. It is therefore important to re-evaluate this aspect so as to provide better

and correct dimensions of the Nigerian federal structure and to demonstrate that even if re-structured as some experts and intellectuals have advocated this would have little or no impact on the issue of ownership and control of maritime territory and resources. It is in the light of this genuine overarching observation that this aspect focuses on three principal issues of:

- (i) Federal versus state tension regarding maritime territory and resources.
- (ii) Is there true federalism in reality?
- (iii) International legal personality to assume ownership and control of maritime territory and resources.

(i) The Federal/state Tension regarding Maritime Territory and Resources

The world oceans and seas have immense significance for the security of States, navigation, international trade and commerce, exploration and exploitation of resources, maritime warfare and marine scientific research. Consequently there is the need for the maintenance and observance of the principles of international law. This importance underscores the reasons why maintenance and enforcement of rule of law over the world oceans and seas has become the cardinal focus and objective of international law. International law requires the support and cooperation of States to achieve the objectives. Ironically, our examination of the perennial problems of title to the maritime territory of Nigeria and its resources and the tension that it has generated between the FCU, the Oil and Gas Companies and the Federal Government has revealed significant and serious threats to these lofty objectives. The threats are being masterminded by some intellectuals and the militant groups, who are bent on taking control of the maritime territory and its resources from the Federal Government. The tension and its attendant threats to maintenance of order over the seas are reflections of a combination of different factors. The imbalance and lopsided nature of the structure of the Nigeria's federation and the pattern of distribution of power in the state are noteworthy. There is overarching and excessive concentration of the federation's political, economic and legal powers in the hands of the Federal Government at the centre. This has led to its excessive influence and control over virtually all of Nigeria's national life to the displeasure of the federating units.

On the basis of the above, the Federal Government controls both the resources on land and in the maritime territories of Nigeria and is only required to share the revenue with the units on a percentage to be determined by it, but usually in accordance with the provisions of the constitution. At the international level, this is advantageous because it helps to prevent fragmentation of the international obligations of Nigeria between the federation and the various units and thus prevents Nigeria from being engaged in unnecessary international responsibility that the action or omission of the units could cause. At the domestic level however, this has created a lot of tensions because revenue allocation, especially to the FCU that bear the brunt of oil and gas exploration and exploitation the most is seen as being too meagre. The lopsided nature of the structure of Nigeria's federation has also led to uneven social, economic and infrastructural development between the several geo-political zones with the Niger Delta being the least developed area among them. This is heightened by the fear of the Niger Delta people of domination by other ethnic groups and the fate that would befall them in the event of exhaustion of the petroleum and gas in the adjacent sea areas, especially as the government is generally seen as not investing or making any contingency plans for the future of the Niger Delta people and their environment. All these have combined to create tension in the Niger Delta area of Nigeria.

With very strong and vocal coastal units represented by the intellectuals and the militant youths fully committed to maximize control over resources of the adjacent sea areas, the maritime territory of Nigeria has become characterized by tensions between the Federal Government, the various oil and gas companies and the FCU. Thus the on-going violent contestation between the parties and the inability of the Government to curb and curtail it is seriously inhibiting maintenance of security, law and order over the Territorial Sea and other maritime zones of Nigeria. On the one hand, the nature of the federal structure is helping to prevent fragmentation of Nigeria's international obligations and preventing unnecessary international responsibility that the action or omission of the federating units could cause if they

were invested with such power. On the other hand Nigeria's inability to curb the incessant kidnapping, hostage takings and other vices in the Niger Delta area is warranting Nigeria's international responsibility.

Nigeria has obligation in international law for the security and protection of foreigners who are most vulnerable within its territory. International law expects that a State fulfills its obligations; as such Nigeria must show overt action of fulfilling its international obligations by properly controlling the acts of terrorism on its TS. As already demonstrated, Nigeria has adopted and applied several measures, such as the establishment of Oil Mineral Producing Areas Development Commission, Niger Delta Development Commission. to resolve the problems. Yet, instead of the problems to diminish, they are in fact escalating daily. This is largely due to the problems of corruption, unfaithful implementation of policies geared toward resolution of the environmental and other problems of the region and the lack of political will by the Federal Government adequately to address the issue of lopsidedness in the distribution of power and the specific grievances of the Niger Delta people. The frequency of occurrence of bombings, hostage takings and the virulent manner in which the militants now carry out the acts suggest that Nigeria has not fulfilled this obligation. These are genuine issues of international law which require Nigeria to have a kind of structure that allows it to fulfill its international obligations.

(ii) Is there a True Federalism in Reality?

The perceived imbalance in the distribution of power has led to the demand for a return to the practice of true federalism by Nigeria. However, international law is silent on the definition of federalism and does not speak of a true or a false type, because it is a matter for political science to determine. The views of writers on constitutional law as earlier reflected on the definitions of federalism quoted in chapter four also vary. This is a reflection of the correctness of the assertion that there are as many definitions of federalism as there are authors on the subject. Nevertheless, there is none of these definitions that has specifically declared a particular federalism

as the true type and the others as not. All we have are some very general universal features. These include one central government, provincial governments and upper and lower legislative houses, written constitution, executive governors, and hierarchy of courts both at the centre and at the provincial levels. The practice of federal States also shows remarkable differences in the distribution of constitutional powers and rights between the federation and the units. The distribution of power has corollaries for international law, especially in terms of personality, responsibility and sovereign immunity. Yet international law neither dictates to federal States how they should distribute the rights or practice their federalism; nor does it set a paradigm that they must adhere to in its practice. In practice therefore, each federal State formulates its own mode of federalism in a way that suits its own peculiarities, political, constitutional, cultural, historical and demographic settings.

There is a common pattern of the federation possessing international personality, sovereign immunity and representing the State at the international plane as against the units. Similarly visible is the general practice of States, whereby the maritime territory and all activities therein are regarded as falling within the federal domain is equally visible. Notwithstanding, there is clear manifestation of lack of uniformity in the practice of some States, such as Germany, United States and Switzerland that accord their federating units some elements of powers relevant to foreign affairs, those that do not and in the UAE, where each Emirate controls maritime resources. Even in these cases, apart from the UAE, the maritime territory and the obligations and responsibilities it entails are still regarded as falling outside the domain of the units. In this sense the units are precluded from indulging in unwarranted activities that could incur the international responsibilities of the State. In the end, it is absolutely unintelligible to speak of a type of federalism as the true type and the other as the false type.

(iii) International Legal Personality to Assume Control of Maritime Territory and Resources

Legal personality refers to capacity to have and also to maintain and perform international rights and duties. It is a capacity that international law generally accords independent sovereign States or other international organisations, but which the components of some sovereign federal States now claim or agitate to possess equally. In some States, the Constitution accords the component units some elements of foreign affairs and in some no such powers have been granted. For the constituent units of a federation to be recognized as possessing international legal personality, the constitution and any other legal instrument must clearly and unambiguously confer powers relevant to foreign affairs on them. Even then, the units exercise the powers either as agents or in the name of the State. It is important to limit international personality to sovereign independent States as this will create certainty in international law and relations among States. Limiting international personality to sovereign independent States will also help to prevent unwarranted international responsibility that the action or omission of the units could bring upon the States.

In Nigeria, a number of reasons account for why the FCU lack the necessary powers to assume ownership and control of the maritime territory of Nigeria and its resources. In the first place, international law only deals with sovereign independent States and other international organizations, by definition, the FCU and other federating units are not a sovereign state and as such cannot assume the international obligations of Nigeria. International law as seen in Hong Kong and Macau does create rights for units of a territory but this can only happen when the parent State agreed to grant the rights to the units on the basis of an international obligation.

Secondly, their lack of international legal personality stems from the fact that rights over maritime territory and resources as opposed to right over the land territory arise principally from international law. This presupposes that it is only the state that is recognized in international law as possessing international legal personality that can assume and exercise the rights over the maritime territory and its resources. Even though international law is flexible, it is not so flexible as to always give legal personality to all the units of a federation.

Thirdly, the units' lack of international legal personality also stems from the failure of the constitution of Nigeria to confer powers relevant to foreign affairs on them. Fourthly, there is no State practice to support the exercise of right of ownership and control of maritime territory and resources by federating units in their own right. What is evident is that States, such as the United States of America quitclaimed a portion of its TS to a number of the federating units, but this was done purely with respect only to the resources of the areas quitclaimed. The quitclaiming does not in any way erode or adversely affect the sovereignty or any other international law rights possessed by the United States over the areas quitclaimed. More importantly and as far as the members of the international community are concerned, they deal only with the sovereign power in the United States and not the units. This is also generally true with all federal States.

(B) The relation of national and international laws

Problems of reconciling certain domestic laws and court decisions by the Nigerian legislature and judiciary with international law run through this thesis. The problems can be classified as substantive and procedural in nature. The substantive problems are mostly reflected by the domestic laws either claiming lesser rights than have been granted by international law. On the other hand, the procedural problems require outright incorporation of any international treaty and convention Nigeria has signed and ratified even when the treaty in question does not require incorporation before assuming legal force. Processes of incorporation are usually prolonged to the end that wide lacunae are created by the undue delay in incorporating treaties and conventions. This practice is inconsistent with international law.

These problems are created by the executive who negotiate and brings Nigeria into treaty relationship with other States, the legislature which incorporates treaties and conventions so negotiated by the executive into domestic legislation and the judges who interpret and apply the laws. Apart from this, the decisions of the court and the opinions of the intellectuals have shown significant confusion in the relationship

between international and domestic laws. The judges had the opportunity of resolving the conflicts and to set the records straight once and for all, but they lost it. Thus, there is no harmony between international law and the domestic laws of Nigeria. This does not augur well for international law generally.

The purpose of this segment therefore, is to show how important it is for there to be harmony between international law and domestic law and to demonstrate that as far as maritime areas are concerned, international law is supreme vis-à-vis the domestic laws.

Thus the re-evaluation of this aspect focuses on three principal issues of:

- (i) The domestic laws claiming lesser rights than granted by international law
- (ii) Domestication of international law under section 12 (1) of the 1999 Nigerian constitution
- (iii) The confusion in the Supreme Court's decision in *Abia case*

(i) Domestic Laws claiming Lesser Rights than granted by International Law

Nigeria's rights over the maritime territory and resources are firmly entrenched in international law, which grants to coastal States sovereignty over the TS and sovereign right and jurisdiction over the Continental Shelf and the Exclusive Economic Zone. Therefore the rights of Nigeria over the maritime areas are not strictly dependent upon the domestic laws, but on international law. However, it is a practical problem when a State claims lesser rights than are actually granted by international law. The problems are these: it is an obligation in international law for coastal States to have and maintain TS, but this depends on the extent a State could claim. If because of the opposite State a coastal State could not claim the full length of 12-miles TS and it claimed a lesser breadth, this cannot be regarded as a breach of international law. In the same token, although United Nations Convention on the Law of the Sea specifically requested coastal States to claim the EEZ before they could have it, failure of a State to claim EEZ means that the concerned State will not have EEZ, but this does not constitute any breach of international law. These examples are

radically different from when a State by its domestic laws deliberately claims lesser rights than granted by international law, such as claiming right of jurisdiction instead of sovereignty. This is not saying that because Nigeria has claimed lesser rights than granted by international law it can no longer have TS, what is being asserted is that because it has claimed lesser rights than granted by international law it will be unable to enforce the rights it has failed to claim against the multinational and other companies, especially the oil and gas companies operating in Nigeria. Nigeria will also be unable to enforce the rights it has failed to claim against the individual citizens and the third States, because the multinational and other companies, the individual citizens and the third states will all ask for the law backing up the enforcement of the rights against them.

Furthermore, although UNCLOS is silent about whether or not it is an obligation for a coastal State to claim TS, article 16 specifically states that coastal States shall publish a chart depicting the baselines delimiting their TS. The question is how a State publishes a chart of its TS, if it is not an obligation to claim TS. It is therefore a breach of Article 16 for a coastal State to fail to claim TS or claiming lesser rights than are granted.

Looking at the problems created for international law by a State claiming lesser rights than granted in a wider perspective of the larger international community it reflects three important things. First, it reflects the weakness of international law in not providing a central authority for making rules of international law. The law e.g. UNCLOS is there and the entitlements of States are there, but there is no central authority to regulate what States have claimed by their domestic laws.

Secondly, although the domestic laws are essential for the assertion of international powers, this is not absolutely crucial, because the courts cannot be seen to be silent or turned a blind eye on the overt exhibition and exercise of state activities or the manifestation of territorial sovereignty and jurisdiction based on power by Nigeria

over its TS and other maritime zones. These are recognized modes of displaying States' title to territory in international law.

Thirdly, this is also a reflection of the lack of uniformity among States in their approaches to adoption, interpretation and application of international law. Therefore, the claiming of lesser rights notwithstanding, Nigeria's title is still protected by international law and to take it away will cause a major disruption of international law.

(ii) Domestication of International Law under Nigeria's 1999 Constitution.

Some international treaties and conventions contain provisions requiring domestication in domestic law, but others do not. In Nigeria there is no problem with regards to treaties requiring domestication; this is covered by Section 12 (1) of the 1999 Constitution. That section provides as follows:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. Thus, international law has to be first domesticated before it can be applicable in Nigeria.

The problem is with treaties and conventions that do not require domestication before they could be applied by States – the so called self executing treaties. Such treaties only require signing and sometimes ratification to bring them into force. The problem is also with section 12 (1) above which does not distinguish between treaties requiring domestication and those that do not. This provision as it presently stands has created procedural difficulties. This means that Nigeria cannot carry out at the domestic level any international obligation it has undertaken under a treaty or a convention it has signed and ratified, unless such a treaty or convention is first enacted in domestic law. On this basis, the following observations are noteworthy. In the first place, when international law is enacted in Nigeria's domestic laws as required by Section 12 (1) of the Constitution, such international law becomes a domestic law and thus is subordinated to the constitution. This is the case for example, with the African Charter on Human and Peoples' Rights of 1981, which on enactment

as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, becomes a domestic law in Nigeria. Thus where the provision of international law that has been domesticated is in conflict or inconsistent with any of the provisions of the constitution, by virtue of Section 1 (3) of the Constitution of 1999, such laws shall to the extent of the inconsistency be null and void. This necessarily raises the question of conflict between international and domestic laws. The problem is not solved by section 19 (d) of the 1999 Constitution which states the foreign objectives of Nigeria to include "respect for international law and treaty obligations". Respect for international law and treaty obligation could mean deference to international law and could also mean obeying the law, but this cannot be clearly elicited from the provisions of that section.

Secondly, the failure of section 12 (1) to distinguish between treaties which do not require domestication (self executing treaties) before their application and those that require it explains in part the problem encountered in the interpretation and application of that section. This means that treaties that do not require domestication still have to be first domesticated in Nigeria before they can have the force of law. Going by the parliamentary and other procedures that domestication has to go through, it takes months if not years for treaties to be domesticated in Nigeria. In the end therefore, a number of very important treaties such as MARPOL could not apply in Nigeria after many years of their signing and ratification because of delay in enacting them into domestic laws. This means that Nigeria's obligations under treaties or conventions awaiting enactment into domestic laws would have to be held in abeyance pending the enactment of the domestic laws. The result is that Nigeria may be inhibited in the performance of the obligations it has already undertaken under a particular treaty or convention. It also means that claimants will be unable to back up their claims with provisions of international treaties and conventions that have not yet been domesticated before a Nigerian domestic court.

The above problems can be classified into two, the first is the problem of conflict between internal and international laws and the second is a procedural problem; they

are not without solutions. The conflict between international and the internal laws can be resolved by the courts having reference to variety of principles. The court needs to take the need to respect the law into consideration. This it could do by taking guidance from the provisions of Section 19 (d) of the Constitution by paying particular respect to international treaties or conventions not requiring domestication and which Nigeria has signed and ratified notwithstanding whether they have been domesticated or not. Another thing is that the court needs to take into consideration the provisions of Article 27 of the Vienna Convention on the Law of Treaty, 1969. This provision makes it clear that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty it has signed and ratified. The provision was applied by the International Court of Justice to the detriment of Nigeria in the *Cameroun vs. Nigeria case*. This should serve as a lesson and guidance to the court always to pay particular respect to international treaties and conventions which Nigeria has signed and ratified, notwithstanding their domestication.

For Nigeria to resolve the procedural problems and effectively perform its international obligations and free itself from unwarranted international responsibility that its action or omission could cause, there is the need totally to overhaul the provisions of section 12 (1) of the constitution. This can be done by strictly restricting application of section 12 (1) to treaties and conventions requiring incorporation. A sub-section should be added to section 12 (1), that is section 12 (2), which makes international treaties and conventions not requiring incorporation to be directly applicable in Nigeria without the need for their incorporation in domestic law. Seeing from the above perspective therefore, the Nigerian laws do not seem to matter; it is international law that is supreme. International law is preferred in this instance because the problem at issue is an international law problem and not domestic law problem.

(iii) The Confusions in the Supreme Court's decisions in *Abia case*

Every arm of the government of a State, beginning from the executive, the legislature and the judiciary has an important role to play in the manner in which international

law is adopted, implemented and applied in the State. The executive for instance is involved in bringing about obligations for the State by making the State a party to a particular treaty or convention. The legislature on the other hand is concerned with incorporating international law in the domestic laws of the State where incorporation is required and thereby giving international law the necessary domestic cloak of legal force. In the case of the judiciary, it interprets and applies the laws so made by the legislature. How well or bad each of these arms plays its own role determines the degree of strength or weakness and the respect that international law enjoys in the State. This is exactly the case with the Supreme Court of Nigeria in the *Abia case*. The *Abia case* is a landmark decision in the history of adjudication in Nigeria. It is a domestic case which could hardly be determined without a thorough recourse to international law. Unfortunately, the numerous legal blunders, mistakes, misapplications of law, concepts and facts, which have been pointed out earlier show that the judges in that case did not grapple well with the intertwined strands of precedent, history, political philosophy, local and international issues that made up the case it was called upon to determine. Its manner of handling the case did enormous disservice to Nigeria and international law in particular. It is not the intention here to criticize but to see what lessons could be learned by the decision.

Although the court affirms and very correctly too, that its decision is based on the premise of international rights and obligations of Nigeria under international law, which endowed Nigeria with those rights over its maritime areas, the various limits which the court by its decision placed on the exercise of those rights by Nigeria cannot be justified in international law. Let us look at two examples. First, the determination that the territories of the FCU and by extension Nigeria's territory ends at the low-water mark is confusing. By so deciding, the Supreme Court has failed properly to discharge its own responsibility of interpreting and applying the law. Though the judiciary may only be able to interpret and apply the laws as made by the legislature and nothing more, this is a wrong notion. The judiciary, especially the Supreme Court, which is the highest court in Nigeria, should be able to go beyond the domestic laws when the matter involves international law by specifically looking into

the treaties or conventions in order to see what rights or obligations it creates for Nigeria and the rights and obligations Nigeria has by the domestic laws claimed. In this way, the court would be able to balance its interpretation and application of international law correctly.

Secondly, the determination equating the authority of Nigeria over the TS to that of mere jurisdiction and by adjudging that the criminal jurisdiction of Nigeria does not in all cases extend to offences committed by foreigners on the TS of Nigeria, the Supreme Court has again missed the point. Thus by not interpreting or applying the law correctly, the Supreme Court has failed to shed any light on international law.

By way of general recapitulation, the above problems are a reflection of how the political actions or inaction of the Government and the response of the judiciary could trigger international responsibility of inconsistency and thus warrant the international responsibility of a State in international law. It is also a reflection of the fact that international law may be as weak as a State wants it to be. Be that as it may, the territory of Nigeria by international law includes, the land territory, the TS, its airspace, sea-bed and subsoil, so that Nigeria exercises sovereignty and not mere power of jurisdiction over it.

(C) Colonialism and self determination

Colonisation as used in this thesis has relevance not only to the concept of self determination; it also has relevance to the nature of transfer of power that took place at the inception of colonialism between Britain and the various Kingdoms and Empires in Nigeria. Colonialism is also relevant to the nature of transfer of sovereignty that took place between Britain and the independent Nigeria on the 1st of October, 1960. That is, whether the nature of the transfer of power at the inception of colonialism and the transfer of sovereignty at independence could be regarded as state succession in international law. Whilst, the Australian cases of *North South Wales vs. Commonwealth* and *Bonser vs. La Macchia* that have been examined succeeded in shedding some lights on the accuracy of describing the transfer of sovereignty at

independence as state succession international law, the cases have not shed similar lights on the accuracy of describing the transfer of power that took place at the inception of colonialism. It is therefore the aim of this segment of the conclusions to clarify this issue. It is important to clarify the issues as doing so will help in clarifying the issue of reversionary interests of the various Kingdoms and Empires over the territories that were transferred at the inception of colonialism.

(i) Transfer of territory between Britain and the Kingdoms and Empires at colonization in 1861

The transfer of territory that took place between Britain and the Empires and Kingdoms in Nigeria in 1861 should not be described as state succession in international law. It was a transfer between a sovereign independent State with a quasi sovereign Kingdoms and Empires. For there to be state succession, international law requires the transfer of sovereignty to take place between two independent sovereign States. This requirement finds justification in the provisions of Article 2(1) (a) of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1978 (not yet in force). That Article defines state succession as “the replacement of one State by another State in the responsibility for the international relations of territory”. At colonization, there was no state known as Nigeria in existence, the transfer of the territories by the various Kingdoms and Empires that later became known as Nigeria was done in the first place through discovery by Britain. Discovery was later followed by the signing of treaties of cession with the rulers of the Kingdoms and Empires. On this basis, the transfer of territory that took place between Britain and the Kingdoms and Empires could not be regarded as having taken place by the process of state succession, but by the processes of cession, consolidation and colonialism. By the processes, the entire territories of the Kingdoms and the Empires were taken over by Britain. Since the nature of the transfer that took place at independence has been explained to be state succession in international law, it necessarily follows that the former territories of the Kingdoms and Empires could only revert to the federation of Nigeria and not the Kingdoms and the Empires.

(2) Implications of self determination

Self determination was primarily a political right but has now assumed a human right. Like any other human rights, it is a legal right that has to be exercised, but not in a legal vacuum. Its exercise has to take cognizance of the political reality that must be present before the right can be legally exercised. Neglect of the necessary political realities can cause many problems. The way and manner in which 'self determination' is being pursued for example in Nigeria shows a remarkable lack of understanding of this requirement. The various groups concerned perceive the concept only from the narrow angle of external self determination in the form of secession, without adverting their minds and thoughts to its other aspect of internal self determination and the conditions imposed by international law for its exercise. Accepting the right of self determination in this narrow context will lead to major dislocations in international law. It will lead to the disintegration of many States and this will cause serious boundary problems. Not only that, self determination in the form of forceful secession will no doubt warrant the right of resistance by the parent State. Resistance could lead to a full blown civil war, in which case states and the United Nations will have to contend with the humanitarian problems arising from it. Nigeria is such a large country with a tremendous population, such forceful secession in the guise of self determination will cause serious consequences not only to the West Africa sub region but to the entire African continent and the international community as a whole.

The maximization of control by the Federal Government over the maritime territory and resources is a right inherent both in international and domestic laws and should not warrant any form of militancy or anything else to wrest it away. The activities of the Niger Delta militants and MASSOB are no doubt an abuse of the right of self determination and are clearly at variance with how international law expects the rights to be exercised. International law expects that the right of self determination be exercised in a way that will not cause dismemberment or disintegration of a sovereign State, which is conducting itself in accordance with the principles of international law. It holds in the highest esteem, the territorial integrity, political independence, stability

and peaceful relations among sovereign States and would abstain from doing anything that could jeopardise peaceful coexistence among States not the least encouraging disintegration of a sovereign independent State. The right of self determination is meant to prevent an abuse of rights of other entities and to create a legal right to freedom for those still under one form of domination or the other. Its exercise is extremely limited and does not grant recourse to the destruction of integrity of States. Thus, except in the very narrow and limited circumstances earlier mentioned, there is no general right of external self determination in international law. It goes without saying too, that a desire to wrest ownership and control of maritime territory and resources from the State, which is vested with those rights by international law is not one of the reasons known to international law for the exercise of the right of self determination.

Recommendations

- (1) As a first step towards the resolution of the title problems over its maritime territory, Nigeria should as a matter of urgency put all former political impediments aside and amend the Territorial Waters Act with a provision declaring its sovereignty over the TS, the seabed, subsoil and the airspace thereof. Section 44 (3) of the 1999 Constitution should be similarly amended to reflect Nigeria's sovereignty over the TS, the seabed, the subsoil and the airspace thereof and the fact that it forms part of the national territory of the Nigeria federation. The amendment to the Constitution should also include a clear and unambiguous definition of what constitutes both the land and the maritime territories of Nigeria. The title "Territorial Waters Act" is misleading, since according to International Law Commission, territorial waters is used to describe both internal

waters only and internal waters and TS combined.¹ Nigeria should therefore, amend the title to read Territorial Sea Act.

- (2) Nigeria is to enact urgently a domestic law declaring its sovereign right and jurisdiction over the adjacent CS. Although a coastal State's rights over the CS may arise automatically, without the need to make a formal claim in international law, in a Federal State such as Nigeria, making a formal claim will go a long way in preventing problems of title such as is seen with regard to the TS.
- (3) Nigeria to organise public enlightenment and awareness campaign to sensitise the populace, especially the FCU to the reality that the sea areas adjacent to Nigeria and the resources thereof belong to Nigeria as the only entity with the necessary legal personality to claim the rights granted by international law.
- (4) Nigeria should undertake an amendment to the Exclusive Economic Zone Act to indicate that the measurement of the EEZ begins from the baselines and not from the external limits of the TS.
- (5) After the various amendments suggested above have been carried out, Nigeria in order to resolve effectively the question of title over its maritime territory and its resources and the restiveness and criminal activities the problem had generated should follow the United States' approach described in chapter six by quitclaiming a three nm portion of its TS to the FCU, while the Federal Government on behalf of the federation continues to exercise acts of sovereignty over the TS, its seabed, subsoil and the airspace thereof and sovereign rights and jurisdiction over the EEZ and CS and their resources. The FCU is to control only the resources within the limits quitclaimed, while at the same time paying necessary taxes to the Federal Government.
- (6) Nigeria to undertake the redraw of the country's map to reflect the changes caused to the existing map by the ICJ decision in the

¹ Whiteman, M.M., *Digest of International Law*, 837, vol. 4, (Department of State Publication 7825), US Government Printing Office, Washington D.C. (1965), vol. 4, p.2

Cameroon vs. Nigeria case, which orders the transfer of Bakassi Peninsula and other towns and villages to Cameroon.

- (7) Nigeria to establish urgently a Maritime Court to assume responsibility over the hearing and determining of admiralty cases, which by virtue of Section 251 (1) (g) of the 1999 Constitution fall within the purview of the Federal High Court. The jurisdiction of the proposed maritime court should invariably extend to cover marine pollution cases.
- (8) Establishment of a coastguard to take charge of the security of the coastal areas, which at present are highly ineffective.

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APPENDICES

A BILL FOR AN ACT TO ABOLISH THE DICHOTOMY BETWEEN ONSHORE AND OFFSHORE IN THE APPLICATION OF THE PRINCIPLE OF DERIVATION FOR THE PURPOSES OF ALLOCATION OF REVENUE ACCRUING TO THE FEDERATION ACCOUNT AND FOR MATTERS CONNECTED THEREWITH.

CLAUSE

Enacted by the National Assembly of the Federal Republic of Nigeria-

SECTION ONE

- (1) As from the commencement of this Act, the 200 metre water depth isobaths contiguous to a State of the Federation shall be deemed to be part of that State for the purpose of computing the Revenue accruing to the Federation Account from the State pursuant to the provisions of the Constitution of the Federal Republic of Nigeria 1999 or any other enactment.
- (2) Accordingly, for the purpose of the application of the principle of derivation, it shall be immaterial whether the revenue accruing to the Federation Account from a State is derived from natural resources located onshore or offshore.

SECTION TWO

This Act may be cited as the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004 and shall be deemed to have come into force in 2004.

EXPLANATION MEMORANDUM

The Bill seeks to Abolish any Dichotomy between Resources Derived Onshore and Offshore in the Application of the Principle of Derivation for the purpose of Revenue Allocation.

This bill was passed by the senate on Tuesday, 20th January, 2004.

Agreement between Great Britain and Germany respecting the Rio del Rey, on the West Coast of Africa signed at Berlin, 14th April, 1893

No. 237.- AGREEMENT between Great Britain and Germany respecting the Rio del Rey, on the West Coast of Africa. Signed at Berlin, 14th April, 1893.

The undersigned:

1. The Honourable P. Le Poer Trench, Her Britannic Majesty's Charge d' Affaires and First Secretary of Embassy;
 2. Sir Claude MacDonald, Her Britannic Majesty's Commissioner and Consul-General of the Oil Rivers Protectorate;
 3. Dr. Kayser, Privy Councillor, Chief of the Colonial Department of the Imperial German Foreign Office;
 4. B. von Schuckmann, Imperial Councillor in the Foreign Office;
- After discussion of various questions affecting the fiscal interests of Germany and Great Britain on their respective territories in the Gulf of Guinea and without prejudice to the conditions laid down in Section 2, Article IV, of the Anglo-German Agreement of the 1st July, 1890 (No. 207), as also the conditions laid down in the Anglo-German Agreements of the 20 April/7th May, 1885 (no. 260), and the 27th July/2nd August 1886, (no. 263) have come to the following Agreement on behalf of their respective Governments:

ARTICLE ONE

That the point names in Section 2, Article IV, of the Anglo-German Agreement of 1st July, 1890 (No. 270), as the head or upper end of the Rio del Rey Creek shall be the point at the north-west end of the Island lying to the west of Oron, where the two waterways, named Urüfian and Ikankan, on the German Admiralty Chart of 1889-90, meet.

ARTICLE TWO

From this upper end of the Rio del Rey to the sea, that is to say, to the promontory marked West Huk on the above mentioned chart, the right bank of the Rio del Rey waterway shall be the boundary between the Oil Rivers Protectorate and the Colony of the Cameroons.

ARTICLE THREE

The German Colonial Administration engages not to allow any trade-settlements to exist or be erected on the right bank of the Rio del Rey Creek or waterway. In like manner the Administration of the Oil Rivers Protectorate engages not to allow any trade settlements to exist or to be erected on the western bank of the Backasay (Bakassey) Peninsula from the first creek below Archibong's (Arsibon's) village to the sea, and eastwards from this bank to the Rio del Rey waterway.

Constitution of the Federal Republic of Nigeria, 1999

We the People of the Federal Republic of Nigeria:

Having firmly and solemnly resolved:

TO LIVE in unity and harmony as one indivisible and indissoluble Sovereign Nation under God dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding:

AND TO PROVIDE for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the Unity of our people:

DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following Constitution:

Chapter One

General Provisions

Part one

Federal Republic of Nigeria

SECTION ONE

- (1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
- (2) The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
- (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

SECTION TWO

- (1) Nigeria is one indivisible and indissoluble Sovereign State to be known by the name of the Federal Republic of Nigeria.
- (2) Nigeria shall be a Federation consisting of states and a Federal Capital Territory.

SECTION THREE

- (1) There shall be thirty-six States in Nigeria, that is to say, Abia, Adamawa, Akwa-Ibom, Anambra, Bauchi, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara.

- (2) Each State of Nigeria named in the first column of Part 1 of the First Schedule to this Constitution shall consist of the area shown opposite thereto in the second column of that Schedule.
- (3) The headquarters of the Government of each State shall be known as the Capital City of that State as shown in the third column of the said Part 1 of the First Schedule opposite the State named in the first column thereof.
- (4) The Federal Capital Territory, Abuja, shall be as defined in Part II of the First Schedule to this Constitution.
- (5) The provisions of this Constitution in Part 1 of Chapter VIII hereof shall, in relation to the Federal Capital Territory, Abuja, have effect in the manner set out hereunder.
- (6) There shall be seven hundred and sixty eight local government areas in Nigeria as shown in the second column of Part 1 of the First Schedule to this Constitution and six area councils as shown in Part II of that Schedule.

SECTION NINE

- (1) The National Assembly may, subject to the provisions of this section, alter any of the provisions of this Constitution.
- (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed by either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the states.
- (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the states.
- (4) For the purposes of section 8 of this Constitution and of subsections (2) and (3) of this section, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in sections 48 and 49 of this Constitution.

SECTION TWELVE

- (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation

CHAPTER II

Fundamental Objectives and Directive Principles of State Policy

SECTION NINETEEN

The foreign policy objectives shall be:

- (a) promotion and protection of the national interest;
- (b) promotion of African integration and support for African unity
- (c) promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations;
- (d) respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication; and
- (e) promotion of a just world economic order.

SECTION TWENTY

The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria

LEGISLATIVE POWERS

Part 1

Exclusive legislative List

- 1 Accounts of the Government of the Federation, and of the offices, courts, and authorities thereof, including audit of those accounts.
- 2 Arms, ammunition and explosives.
- 3 Aviation, including airports, safety of aircraft and carriage of passengers and goods by air.
- 4 Awards of national titles of honour, decorations and other dignities.
- 5 Bankruptcy and insolvency
- 6 Banks, banking, bills of exchange and promissory notes.
- 7 Borrowing of moneys within or outside Nigeria for the purposes of the Federation or any State
- 8 Census, including the establishment and maintenance of machinery for the continuous and universal registration of births and deaths throughout Nigeria
- 9 Citizenship, naturalisation and aliens
- 10 Commercial and industrial monopolies, combines and trusts.
- 11 Construction, alteration and maintenance of such roads as may be declared by the National Assembly to be Federal trunk roads.
- 12 Control of capital issues
- 13 Copyright.
- 14 Creation of States.
- 15 Currency, coinage and legal tender.
- 16 Customs and excise duties
- 17 Defence.
- 18 Deportation of persons who are not of Nigeria.
- 19 Designation of securities in which trust funds may be invested
- 20 Diplomatic, consular and trade representation.

- 21 Drugs and poisons.
- 22 Election to the offices of President and Vice-President or Governor and Deputy Governor and other office to which a person may be elected under this Constitution, excluding election to a local government council or any office in such council.
- 23 Evidence.
- 24 Exchange control.
- 25 Export duties.
- 26 External affairs.
- 27 Extraction.
- 28 Fingerprints, identification and criminal records.
- 29 Fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within Nigeria.
- 30 Immigration into and emigration from Nigeria.
- 31 Implementation of treaties relating to matters on this list.
- 32 Incorporation, regulation and winding up of bodies corporate, other than co-operative societies, local government councils and bodies corporate established directly by any Law enacted by a House of Assembly of a State
- 33 Insurance
- 34 Labour, including trade unions, industrial relations; conditions, safety and welfare of labour; Industrial disputes; prescribing a national minimum wage for the federation or any part thereof; and industrial arbitrations.
- 35 Legal proceedings between Governments of State or between the Government of the federation and Government of any State or any other authority or person
- 36 Maritime shipping and navigation, including—
 - (a) shipping and navigation of tidal waves;
 - (b) shipping and navigation on the River Niger and its effluents and on any such other inland waterway as may be designated by the National Assembly to be an international waterway or to be an inter-state waterway.

(c) lighthouses, lightships beacons and other provisions for the safety of shipping and navigation;

(d) such ports as may be declared by the National Assembly to be Federal ports (including the constitution and powers of port authorities for Federal ports).

37 Meteorology.

38 Military (Army, Navy, and Air force) including any other branch of the armed forces of the Federation.

39 Mines and minerals, including oil fields, oil mining, geological surveys and natural gas

40 National parks being such areas in a State as may, with the consent of the Government of the State, be designated by the National Assembly as national parks,

41 Nuclear Fuel.

42 Passports and Visas.

43 Patents, trade marks or business names, industrial designs and merchandise marks

44 Pensions, gratuities and other- like benefits payable out of the Consolidated Revenue Fund or any other public funds of the Federation.

45 Police and other government security services established by law.

46 Posts, telegraphs and telephones

47 Powers of the National Assembly and the privileges and immunities of its members

48 Prisons

49 Professional occupations as may be designated by the National Assembly

50 Public debt of the Federation

51 Public Holidays

52 Public relations of the Federation

- 53 Public service of the Federation including the settlement of disputes between the Federation and officers of such services
- 54 Quarantine
- 55 Railways
- 56 Regulation of political parties.
- 57 Service and execution in the State of the civil and criminal processes, judgements, decrees, orders and other decisions of any court of law established by the House of Assembly of the State
- 58 Stamp duties.
- 59 taxation of incomes, profits and capital gains, except as otherwise prescribed by the constitution
- 60 The establishment and regulation of authorities for the Federation or any part thereof-
- (a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this constitution
 - (b) to identify, collect preserve or generally look after ancient and historical monuments and records and archaeological sites and remains declared by the National Assembly to be of national importance,
 - (c) to administer museums and libraries other than museums and libraries established by the Government of the State.
 - (d) to regulate tourist traffic; and
 - (e) to prescribe minimum standards of education at all levels
- 61 the formation, annulment and dissolution of marriages other than marriages under Islamic Law and including matrimonial causes relating thereto.
- 62 Trade and commerce, and in particular-
- (a) trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria and trade and commerce between the States;
 - (b) establishment of a purchasing authority with power to acquire for export or sale in world markets such agricultural produce as may be designated by the National Assembly;
 - (c) inspection of produce to be exported from Nigeria and enforcement of grades and standards of quality in respect of produce so inspected;
 - (d) establishment of a body to prescribe and enforce standards of goods and commodities offered for sale;
 - (e) control of the prices of goods and commodities designated by the National Assembly as essential goods or commodities; and

- (f) registration of business names
- 63 Traffic on Federal trunk roads
- 64 water from such sources as may be declared by the National Assembly to be sources affecting more than one State
- 65 Weights and measures.
- 66 Wireless, broadcasting and television other than broadcasting and television provided by the Government of the State; allocation of wave-lengths for wireless, broadcasting and television transmission
- 67 any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution.
- 68 Any matter incidental or supplementary to any matter mentioned elsewhere in this list.

EXCLUSIVE ECONOMIC ZONE ACT 1978

CHAPTER 116

An Act to delimit the Exclusive Economic Zone of Nigeria being an area extending up to 200 nautical miles seawards from the coasts of Nigeria. Within this Zone, and subject to universally recognised rights of other States (including land-locked States), Nigeria would exercise certain sovereign rights especially in relations to the conservation or exploitation of the natural resources (mineral, living species etc.) of the seabed, its subsoil and superjacent waters and the right to regulate by law the establishment of artificial structures and installations and marine scientific research, amongst other things. [2nd October 1978]

SECTION ONE

(1) Subject to the other provisions of this Act, there is hereby denominated a zone to be known as the Exclusive Economic Zone of Nigeria (hereinafter referred to as the “Exclusive Zone”) which shall be an area extending from the external limits of the territorial waters of Nigeria up to a distance of 200 nautical miles from the baselines from which the breadth of the territorial waters of Nigeria is measured.

(2) Notwithstanding subsection (1) of this section but subject to the provision of any treaty or other written agreement between Nigeria and any neighbouring littoral State, the delimitation of the Exclusive Zone between Nigeria and any such State shall be the median or equidistance line.

(3) For the purposes of this section, “the median or equidistant line” means the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Nigeria and the State concerned are measured.

SECTION TWO

(1) Without prejudice the Territorial Waters Act, the Petroleum Act, the Sea Fisheries Act, sovereign and exclusive rights with respect to the exploration and exploitation of the natural resources of the sea bed, subsoil and superjacent waters of the Exclusive Zone shall vest in the Federal Republic of Nigeria and such rights shall be exercisable by the Federal Government or by such Minister or agency as the Government may from time to time designate in that behalf either generally or in any special case.

(2) Subsection (1) of this section shall be subject to the provision of any treaty to which Nigeria is a party with respect to the exploitation of the living resources of the Exclusive Zone.

SECTION THREE

(1) For the purpose of exploring and exploiting, conserving and managing the natural resources and other activities for the economic exploitation and exploration of the Exclusive Zone, the appropriate authority may establish, or permit the establishment, operation and use by any other person subject to such conditions as may be prescribed, in designated areas-

(a) Artificial islands;

(b) Installations and structures.

(2) The appropriate authority may, for the purpose of protecting any installations in a designated area by order published in the Federal Gazette, prohibit ship, subject to any exceptions provided in the order, from entering without its consent such part of that area as may be specified in such order.

(3) If any ship enters any part of a designated area in contravention of an order made under this section, its owner or master shall be liable on conviction to a fine of ₦5,000 or imprisonment for twelve months or to both unless he proves that the prohibition inquiry have become, known to the master.

(4) In this section, “designated area” means any area of the Exclusive Zone so designated by the appropriate authority for the purposes of subsection (1) of this section.

SECTION FOUR

(1) Any act or omission which-

(a) Takes place on, under or above an installation in a designated area or any waters within 200 metres of such an installation; and

(b) Would, if taking place in any part of Nigeria, constitute an offence under the enactment in force in that part, shall be treated for the purpose of that law as taking place in Nigeria.

(2) Offences under the subsection (1) of this section shall be triable by the Federal High Court whether or not such offence would, if actually committed in Nigeria be triable under the applicable enactment by a court other than the Federal High Court.

(3) The prosecution of any offence under this Act shall be at the instance of the Attorney-General of the Federation.

(4) In this section, “enactment” means any Act or Law relating to criminal or civil law (including torts) and any subsidiary instrument made thereunder including rules of court and, in matters other than criminal matters, rules of law applicable to or adopted in any part of Nigeria.

SECTION FIVE

(1) Where a body corporate is guilty of an offence under this Act and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or of any person who was purporting to act in any such capacity he, as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) for the purpose of this section, “director” in relation to a body corporate established for the purpose of carrying on under national ownership any industry or part of an industry or undertaking being a body corporate whose affairs are managed by its members, means a member of that body corporate.

SECTION SIX

In this Act, unless the context otherwise requires-

“the appropriate authority” means the Federal Government or any other person or authority designated in that behalf by the Federal Government by virtue of section 2 of this Act;

“designated area” has the meaning assigned thereto by section 3(4) of this Act;

“the Exclusive Zone” means the Exclusive Economic Zone of Nigeria as delimited by section 1 of this Act;

“territorial waters of Nigeria” has the meaning assigned thereto by the Territorial Waters Act.

SECTION SEVEN

This Act may be cited as the Exclusive Economic Zone Act.

EXCLUSIVE ECONOMIC ZONE (AMENDMENT) DECREE 1998

The Federal Military Government hereby decrees as follows:-

1. The Exclusive Economic Zone Act is hereby amended in section 2 by-
 - a) Deleting the existing subsections (2) and (3)
 - b) Inserting immediately thereafter the following new subsection (2), that is-

“(2) The provisions of subsection (1) of this section shall not be applicable to the extent that under the provisions of any treaty or other written agreement between Nigeria and any neighbouring territorial State, the Exclusive Zone is agreed to be less than the distance specified in subsection (1) of this section”.
2. This Decree may be cited as the Exclusive Economic Zone (Amendment) Decree 1998

MADE at Abuja this 25th day of December, 1998.

General Abdulsalami Alhaji Abubakar,
Head of State, Commander-In-Chief of the Armed Forces,
Federal Republic of Nigeria.

Explanatory Note

(This does not form part of the above Decree but is intended to explain its purport)

The Decree amends the Exclusive Economic Zone Act to provide that the Exclusive Economic Zone of Nigeria shall be a distance of 200 nautical miles from the baseline from which the breadth of the territorial waters of Nigeria is measured except to the contrary as may be expressly contained in a treaty or other written agreement.

TERRITORIAL WATERS ACT

CHAPTER 428

An Act to determine the limits of the territorial waters of Nigeria and for other matters connected therewith [8th April 1967]

SECTION ONE

(1) The territorial waters of Nigeria shall for all purposes include every part of the open sea within thirty nautical miles of the coast of Nigeria (measured from low water mark) or of the seaward limits of inland waters.

(2) Without prejudice to the generality of the foregoing subsection that subsection shall in particular apply for the purpose of any power of the Federal Government to make with respect to any matter, laws applying to or to any part of the territorial waters of Nigeria.

(1) Accordingly-

- a) In the definition of territorial waters contained in the section 18(1) of the Interpretation Act 1964, for the words "twelve nautical miles" there shall be substituted the words "thirty nautical miles"; and
- b) References to territorial waters or to the territorial waters of Nigeria in all other existing Federal enactments (and in particular the Sea Fisheries Act) shall be construed accordingly.

(2) In subsection (3) of this section, existing "Federal enactment" means-

- a) Any Act of the National Assembly passed or made before the commencement of this Act or 26th August 1971 (which is the date of commencement of the amendment to this Act), including any instrument made before 1st October 1960 in so far as it has effect as an Act; or
- b) Any order, rules, regulations, rules of court or byelaws made before the commencement of this Act or 26th August 1971 aforesaid in exercise of powers conferred by any such Act or instrument.

(2) Nothing in this section shall be construed as altering the extent of or the area covered by any lease, licence, right or permit grant under any enactment or instrument before the commencement of this Act or 26th August 1971 (which is the date of commencement of the amendment to this Act).

SECTION TWO

(1) Any act or omission which-

- a) Is committed within the territorial waters of Nigeria, whether by a citizen of Nigeria or a foreigner; and
- b) Would, if committed in any part of Nigeria constitute an offence under the law in force in that part,

Shall be an offence under law and the person who committed it may, subject to section 3 of this Act, be arrested, tried and punished for it as if he had committed it in that part of Nigeria.

(1) Subsection (1) of this section-

- a) Shall apply whether or not the act or omission in question is committed on board or by means of a ship or in, on or by means of a structure resting on the sea bed or subsoil; and
- b) Shall, in the case of an act or omission committed by a foreigner on board or by means of a foreign ship, apply notwithstanding that the ship is a foreign one.

(2) For the purpose of the issue of a warrant for the arrest of any person who is by virtue of this section liable to be tried in some part of Nigeria for an offence, that offence may be treated as having been committed in any place in that part.

(3) Any jurisdiction conferred on any court by this section shall be without prejudice to any jurisdiction (and in particular any jurisdiction to try acts of piracy as defined by the law of nations) exercisable apart from this section by that or any other court.

(3) Nothing in this section shall be construed as derogating from the jurisdiction possessed by Nigeria under the law of nations, whether in relation to foreign ships or person on board such ships or otherwise.

(4) In this section-

“foreigner” means a person who is not a citizen of Nigeria;

“foreign ship” means a ship of any country other than Nigeria;

“ship” includes floating craft and floating structures of every description.

SECTION THREE

(1) Subject to the provisions of this section, a Nigerian court shall not try a person who is not a citizen of Nigeria for any offence committed in the open sea within the territorial waters of Nigeria unless before the trial the Attorney-General of the Federation has issued a certificate signifying his consent to the trial of that person for that offence.

(2) Nothing in subsection (1) of this section-

- a) Shall affect any power of arrest, search, entry, seizure or custody exercisable with respect to an offence which has been, or is believed to have been, committed as aforesaid;
- b) Shall affect any obligation on any person in respect of a recognisable or bail bond entered into a consequence of his arrest of any other person, for such an offence;

- c) Shall affect any power of any court to remand (whether on bail or in custody) a persons brought before the court in connection with such an offence;
- d) Shall affect anything done or omitted in the course of a trial unless in the course of the trial objection had already been made that, by reason of subsection (1) of this section, the court is not competent to proceed with the trial; or
- e) Shall, after the conclusion of a trial, be treated as having affected the validity of the trial if no such objection as aforesaid was made in the proceedings at any stage before the conclusion of the trial.

(2) Subsection (1) of this section shall not apply to the trial of any act of piracy as defines by the law of nations

(3) A document purporting to be a certificate issued for the purpose of subsection (1) of this section to be signed by the Attorney-General of the Federation shall be received in evidence and shall, unless the contrary is proved, be taken to be a certificate issued by the said Attorney-General.

(4) Nothing in this section shall be construed as derogating from the provisions of any other enactment restricting the prosecution of any proceedings or requiring the consent of any authority to the prosecution thereof.

(5) In this section, “offence” means any act or omission which by virtue of section 2 of this Act or any other enactment is an offence under the law of Nigeria or any part thereof.

SECTION FOUR

This Act may be cited as the Territorial Waters Act.

Territorial Waters (Amendment) Decree, 1998 Decree No. 1

The Federal Military Government hereby degrees as follows:

(1) The Territorial Waters Act) in this Decree referred to as the “principal Act”) is hereby amended as set out in this Decree.

(2) Section 1 of the principal Act is amended as follows;

(a) In subsection (1) for the word “thirty” there shall be substituted the word “twelve”

(b) By deleting subsection (3) (a) thereof and inserting a new subsection (3)(a) as follows-

“(3) (a) in the definition of territorial waters contained in section 18(1) of the Interpretation Act, for the words “thirty nautical miles” there shall be substituted the words “twelve nautical miles”.

1. This Decree may be cited as the Territorial Waters (Amendment) Decree 1998.

Made at Abuja this 1st day of January 1998.

**General Sani Abacha, Head of State,
Commander-in-Chief of the Armed Forces,
Federal Republic of Nigeria.**

EXPLANATORY NOTE *(This note does not form part of the decree but is intended to explain its purport)*

This Decree amends the Territorial Waters Act Cap, 428 LFN by changing the territorial waters of thirty nautical miles to twelve nautical miles.

**THE SOUTHERN NIGERIA PROTECTORATE ORDER IN COUNCIL,
1911, NO. 145**

At the Court of Buckingham Palace, the 4th day of February, 1911

**Present
The King's Most Excellent Majesty in Council.**

Whereas by the Foreign Jurisdiction Act, 1890, it is amongst other things, enacted, that it shall be lawful for his Majesty the King to hold, exercise, and enjoy any jurisdiction which His Majesty has or may at any time hereafter have within a foreign country in the same and as ample a manner as if His Majesty had acquired that jurisdiction by the session or conquest of territory.

And whereas by certain Letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the 28th day of February 1906, it was provided that the Colony of Lagos should, from the date of the coming into operation of the said Letters Patent, be known as the Colony of Southern Nigeria, and a Legislative Council was appointed for the said Colony, with certain powers and authority to legislate for the said Colony, as in the said Letters Patent is more fully set forth.

And whereas by an Order of His Majesty King Edward the Seventh in Council bearing the date sixteenth day of February 1906, and known as the Southern Nigeria Protectorate Order in Council, 1906, as amended by an order of His said late Majesty in Council, bearing date Thirty-first day of May 1910, and known as the

Southern Nigeria Protectorate Order in Council, 1910, it was (amongst other things) provided that it should be lawful for the Legislative Council for the time being of the Colony of Southern Nigeria by any ordinance or ordinances to exercise and provide for giving effect to all such powers and jurisdiction as His Majesty might at any time before the passing of the above recited Order of the Sixteenth day of February 1906, have acquired or might at any time thereafter acquire in any of the territories therein described and known as the Protectorate of Southern Nigeria.

And whereas it is expedient to make further and other provision for the peace, order and good government for the said territories:

Now, therefore, His Majesty, by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it hereby ordered, as follows:-

ARTICLE ONE

This Order may be cited as the Southern Nigeria Protectorate Order in Council, 1911.

ARTICLE TWO

This Order shall apply to the territories of Africa which are bounded on the south by the Atlantic Ocean, on the west by the line of the frontier between British and French territories, on the north and north-east by the British Protectorate of Northern Nigeria, and on the east by the frontier between the British and German territories.

ARTICLE THREE

In this Order, unless the subject or context otherwise requires:-

“His Majesty” includes His Majesty’s heirs and successors.

“Secretary of State” means one of His Majesty’s Principal Secretaries of State

“Treaty” includes any treaty, convention, agreement or arrangement, made by or on behalf of Her late Majesty Queen Victoria, of His Late Majesty King Edward the Seventh, or of His Majesty with any civilized Power, or with any Native tribe people, chief or king and any regulation appended to any such treaty, convention, agreement or arrangement.

“Governor” means the Governor and Commander-In-Chief for the time being of the Colony of Southern Nigeria and includes every person for the time being administering the Government of the said Colony.

ARTICLE FOUR

The Governor and Commander-In-Chief for the time being of the Colony of Southern Nigeria (herein-after called the Governor) shall be the Governor of the Protectorate of Southern Nigeria, and he is hereby authorized, empowered and

commanded to exercise on His Majesty's behalf all such powers and jurisdiction as His Majesty at any time before or after the passing of this Order had or may have within the said territories and to that end to take or cause to be taken all such measures and to do or cause to be done all such matters and things therein as are lawful and as in the interest of His Majesty's service he may think expedient, subject to such instructions as he may from time to time receive from His Majesty' or through a Secretary of State.

ARTICLE FIVE

It shall be lawful for the Legislative Council for the time being of the colony of Southern Nigeria by any ordinance or ordinances to exercise and provide for giving effect to all such powers and jurisdiction as His Majesty at any time before or after the passing of this Order has acquired in the said territories or any of them.

Provided as follows:-

(1) That nothing in any such ordinance or ordinances contained shall take away or affect any rights secured to any natives in the said territories by any treaties or agreements made on behalf or with the sanction of Her late Majesty Queen Victoria, His late Majesty King Edward the Seventh, or of His Majesty, and all such treaties and agreements shall be and remain mutually binding on all parties to the same.

(2) That all laws, ordinances, proclamations, byelaws and regulations of whatsoever nature on force at the date of the commencement of this Order within the said territories or any of them shall continue in force until repealed or revoked by or in pursuance of any law or ordinance passed by the Legislative Council of the Colony of Southern Nigeria.

(3) That every suit, action, complaint, matter or thing which shall be depending in any Court within the said territories at the commencement of this Order shall and may be proceeded with in such Court in like manner as if this Order had not been passed.

ARTICLE SIX

The Governor shall have a negative voice in the making or passing of all such Ordinances as aforesaid. And the right is hereby reserved to His Majesty to disallow any such Ordinances as aforesaid. Such disallowances shall be signified to the Governor through one of His Majesty's Principal Secretaries of State and shall take affect from the time when the same shall be promulgated by the Governor.

The right is also hereby reserved to His Majesty, with the advice of His Privy Council, from time to time to make all such Laws or Ordinances as may appears to Him necessary for the exercise of such powers and jurisdiction as aforesaid as fully as if this Order has not been made.

ARTICLE EIGHT

In the making and establishing of all such Ordinances the Governor and the Legislative Council shall conform to and observe all rules, regulations and directions in that behalf contained on any instructions under His Majesty's Sign Manual and Signet, and, until further directed, the Instructions in force for the time being as to the passing of Ordinances by the said Legislative Council for the peace, order, and good government of the said Colony of Southern Nigeria, shall, so far as they may be applicable, be taken and deemed to be in force in respect of Ordinances passed by the said Council by virtue of this Order.

ARTICLE NINE

In any of the events which he is authorized, by the Letters Patent of the Twenty-eight day of February 1906 (constituting the office of Governor and Commander-In-Chief of the Colony of Southern Nigeria) or any other Letters Patent adding to, amending, or substituted for the same to appoint a Deputy within any part of the Colony of Southern Nigeria, the Governor may appoint any person to be his Deputy within any part of the Protectorate of Southern Nigeria and in that capacity to exercise, during his pleasure, such of the powers vested in the Governor by his Order, or by other Order of His Majesty in Council or by any law or Ordinance now or hereafter to be in force in the said Protectorate, except the powers of removal, suspension and pardon, as the Governor himself or any powers or authorities. Every such Deputy shall, in the discharge of his office, conform to and observe all such instructions as the Governor shall address to him for his guidance.

ARTICLE TEN

The Governor may constitute and appoint all such Judges, Commissioners, Justices of the Peace and other necessary officers as may be lawfully constituted and appointed by His Majesty, all of whom unless otherwise provided by law shall hold their offices during His Majesty's pleasure.

ARTICLE ELEVEN

The Governor may, upon sufficient cause to him appearing, dismiss an public officer whose pensionable emoluments do not exceed one hundred pounds a year, provided that in every such case the grounds of intended dismissal are definitely stated in writing and communicated to the officer, in order that he may have full opportunity of exculpating himself, and that the matter is investigated by the Governor with the aid of the head for the time being of the Department in which the officer is serving. The Governor may, upon sufficient cause to him appearing, suspend from the exercise of his office any person holding any office within the Protectorate of Southern Nigeria, whether appointed by the Governor or by virtue of any commission or Warrant from His Majesty, or in His Majesty's Name, or by any other mode of appointment. Every such suspension shall continue and have effect

only until His Majesty's pleasure therein shall be signified to the Governor. In proceeding to any such suspension, the Governor is strictly to observe the directions in that behalf given to him by any Instructions from His Majesty or signified through a Secretary of State.

ARTICLE TWELVE

When any crime or offence has been committed within the Protectorate of Southern Nigeria, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in His Majesty's Name and on His Majesty's behalf, grant a pardon to any accomplice in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted in any Court, or Protectorate, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender or any respite of the execution of such sentence, for such period as the Governor thinks fit, and may remit any fines, penalties or forfeits due or accrued to His Majesty

ARTICLE THIRTEEN

The Seal now or hereafter in use as the Public Seal of the Colony of Southern Nigeria shall be and be deemed to be also the public Seal of the Protectorate of Southern Nigeria, and shall be used for sealing all the things whatsoever that shall pass the said Seal

ARTICLE FOURTEEN

This order shall be published in the Gazette of the Colony of Southern Nigeria and shall thereupon commence and come into operation; and the Governor shall give directions for the publication of this Order at such places and in such manner, and for such time or times as he thinks proper for giving due publicity thereto within the Protectorate of Southern Nigeria.

ARTICLE FIFTEEN

The above recited Orders in Council of the Sixteenth day of February 1906 and the Thirty-first day of May 1910, shall from the commencement of this Order, be revoked, without prejudice to anything lawfully done thereunder.

ARTICLE SIXTEEN

His Majesty may from time to time revoke, alter, add to, or amend this Order. And the High Honourable Lewis Harcourt, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

